CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1822.

East'n District. *March*, 1822.

WEIMPRENDER'S SYNDICS vs. *WEIMPRENDER & AL.*

WEIMPRENDER'S SYNDICS *vs.* WEIMPRENDER & AL.

A forced surrender cannot be ordered, unless the party alleged to be a bankrupt, is made defendant and cited as in ordinary cases.

APPEAL from the court of the first district.

PORTER, J. To the petition in this case, the defendants have filed a special plea, denying the right of the plaintiffs to sue.

The plaintiffs allege, that they are the syndics of George Weimprender, and the proceedings had in the suit of St. Avid and others against said Weimprender, for a forced surrender, have been produced in evidence, to shew that they are such.

The first question to be ascertained from the evidence thus offered is, whether the person against whom those proceedings were had, has been legally declared a bankrupt; if he has not, the plaintiffs cannot be his syndics.

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The petition is in the usual form, and prays that a forced surrender of the property of Weimprender's father may be decreed, for the benefit of his creditors. But it contains no demand that the insolvent may be made defendant, and cited. Nor does it appear that any citation was served on him.

We are of opinion that a forced surrender cannot be ordered, unless the party alleged to be a bankrupt, is made defendant, and cited as in ordinary civil actions. If this process is necessary in any case, and the law requires it in all others, we think it is of the first importance that it should not be dispensed with where a remedy of this kind is asked, which deprives a citizen of the possession of the whole of his property.

Such would be the determination of this court on general principles. But the law on this subject has furnished us with higher authority than any deductions of ours. According to a provision of the *Partida* 3, *tit.* 7, *ley.* 1, *in princ.* citation is the root and foundation of every suit. The Spanish authors say, it is required by natural as well as positive law, and is the basis on which every judgment must rest. *Curia Phillippica, p.* 1, *sec.* 12.

Citation, *n.* 1, 2. 2 *Febrero*, *p.* 2, *lib.* 3, *cap.* 1, *sec.* 3, *n.* 129, and that no authority, whether of the king or the law, can dispense with it, or render valid those proceedings which want it.

It was urged in argument, that this was a proceeding in *rem*. But no authority was produced in support of this position. To us it appears, that a petition against an insolvent, for a forced surrender, is a personal action to obtain his property. An action given to creditors, in consequence of certain facts being established in relation to the conduct of the person who owes them, or his capacity to meet his engagements. If the debtor then is deeply interested in the measures thus taken against him (as it must be admitted he is) if his reputation and his property may be both sacrificed by an improper exercise of the right vested in the creditor, surely every means of defence should be afforded for his protection, which are assured to him in any other case by the law and the constitution.

It was next urged, that this defect is cured, because it appears that the insolvent had notice of the proceedings. But this, in our opinion, is not sufficient. In an ordinary case

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it would not cure want of citation, to shew that the defendant knew there was a suit pending against him. We had occasion to give this subject a very ample consideration in the case of *Dyson* vs. *Brandt & al.* 9 *Martin*, 497, and we there held, that appearing in court, pleading, and contesting the cause on other grounds than the want of citation, cured a similar defect to that which exists here. In the present case, the insolvent has not done any one of these acts.

Nor did the defendants acknowlege the authority of the present syndics, in the suit of *St. Avid & others* vs. *Weimprender*. In that case the provisional syndic seized a crop of sugar. A claim was filed on the part of M. G. and B. Weimprender, asserting the property to be theirs, and that Montegut had seized it, as belonging to their father. This was nothing more than a necessary averment, according to the truth of the case, and cannot be taken as an acknowlegement that any of the proceedings were legal.

The judgment of the district court should be annulled, avoided and reversed, and judgment, as in case of a non-suit, be given for the defendants, with costs in both courts.

MATHEWS, J.* I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, as in case of non-suit, with costs in both courts.

Hennen and *Denis* for the plaintiffs, *Duncan* and *Eustis* for the defendants.

PREVOSTY vs. *NICHOLS.*

APPEAL from the court of the fourth district.

Where a defendant, in the course of the transaction on which the action is founded, has acted with the plaintiff as possessing a certain character, and acknowleged the title by virtue of which he sues, this is *prima facie* evidence that he is entitled to sue; and if he is not, the burthen of proof is then thrown on the defendant.

PORTER, J. This is an action to recover the value of services rendered as a physician. It is objected by the defendant, that the plaintiff has not produced a license authorising him to practise physic.

We are of opinion, that where a defendant, in the course of the transaction on which the action is founded, has acted with the plaintiff as possessing a certain character, and acknowleged the title by virtue of which he sues, this is *prima facie* evidence that he is

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* MARTIN, J. did not sit in this case, having been of counsel in it.

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entitled to sue; and if he is not, the burthen of proof is then thrown on the defendant.—*Phillip's Evidence*, 171, (edit. 1820.) In the present case, it is clearly established that the plaintiff was employed as a physician, and frequently admitted to be such by defendant, and his agents; we therefore think the objection taken to the defendant's right to maintain this action, has not been sustained.

On the merits, the testimony is contradictory. The weight of it is, perhaps, against the conclusions which the jury has drawn; but it does not so preponderate on that side as to permit us to disturb the verdict.

The judgment of the district court should be affirmed with costs.

MARTIN, J. I concur.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Dumoulin for the plaintiff, *Duncan* for the defendant.

VIDAL vs. *THOMPSON.*

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The affidavit necessary to hold the defendant to bail, may be annexed to a supplemental as well as to an original petition.

Wherever the obligation be contracted, the performance must be according to the laws of the place where it is to take place.

Objections to the legality of the summons of the jury, are too late after their verdict is recorded.

APPEAL from the court of the fourth distrct.

MARTIN, J. delivered the opinion of the court.* This case is before the court on three bills of exceptions, to the opinion of the court.

1. In refusing to discharge the bail of the defendant, on the ground that the affidavit of the plaintiff, for the purpose of obtaining bail, was not annexed to the original, but to a supplemental petition.

2. In directing the jury that the general principle of the law of nations, "that a person is considered, as having contracted, in that place in which he bound himself to pay, or perform his obligation, (as laid down in 2 *Huber. Pre.* 6, 1, *t.* 3) was repealed by the *Civil Code*, 4, *art.* 10."

3. In denying a new trial, on the defendant's affidavit, that the jury were not summoned legally; a circumstance which did not come to his knowlege till after the trial.

I. We think the district court was correct in holding, that the affidavit necessary to hold

* PORTER, J. was absent through indisposition when this case was argued.

By a late act of the assembly, that which required the separate opinion of each judge, in every case, is repealed.

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the defendant to bail, may be annexed to a supplemental as well as to an original petition. The law has made no distinction; it suffices that it be filed with the petition. We have held, that interrogatories may be filed with a supplemental petition.

II. I do not see, that the part of the *Civil Code* quoted affects the principle cited by *Huberus*. He means to say, that wherever the obligation be contracted, the performance must be according to the laws of the place where it is to take place. For example, that the days of grace, allowed in certain places, are to be reckoned according to the laws and usages of the place, in which the bill is to be paid, not of the place where it is drawn.

The *Civil Code*, in the part quoted, provides only, that " the form and force of acts and written instruments depend on the laws and usages of the places where they are passed or executed."

We see nothing contradictory in the two propositions; both may well stand together. An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place where it is made; but the laws and usages of the place where the obli-

gation of which it is evidence, is to be fulfilled, must regulate the performance. A bill, drawn out of London, must be paid at the expiration of the days of grace, which the laws and usages of that place recognise, but need not have those stamps which are by law required on a bill drawn there.

We think the district court erred in this instance.

III. It was correct in disallowing the new trial, on the allegation that the jury were not properly drawn out. The objection came too late after the verdict was received and recorded.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for trial, with directions to the judge not to charge the jury—that the principle, that a person is considered as having contracted in the place, in which he bound himself to pay or perform his obligation, is repealed by the part of the *Civil Code* quoted; and the costs of the appeal are to be paid by the plaintiff.

Duncan for plaintiff, *Delachaise* for defendant.

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BRYAN & WIFE vs. MOORE'S HRS.

BRYAN & WIFE vs. *MOORE'S HEIRS.*

If a party mistate his right, in the petition, but offers evidence, which clearly establish it, and the opposite party does not object to the evidence, the error is cured.

Property within the state must be distributed, according to its laws, unless it be shewn that the court is bound to give effect to those of another county.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This action was instituted in the court of probates of the parish of Feliciana, on the part of Mrs. Bryan, to obtain a partition of the estate of Moore, her former husband, of which she claims one half as heir. The capacity in which she may be entitled to any part of the property left by her former husband, at his decease, is clearly mistaken in the petition for partition. But, as the parties have proceeded in the investigation of their rights, with reference to the true capacity in which she ought to have alleged her claim, it is considered by this court, that it would be unjust now to dismiss the suit, especially as this exception has never been made in any stage of the pleadings, and as the mistake in the allegation may be waved or cured by the evidence in the case, according to the 10th *law* of the 17th *tit.* and 4th *book* of the *Novissima Recopilacion*, already recognised in the case of *Canfield & al.* vs. *M'Laughlin.*

The heirs of Moore being dissatisfied with the judgment of the court of probates, took the cause up by appeal to the district court.

wherein the judgment was reversed; and Bryan and wife being, in turn, dissatisfied with the judgment of the latter court, appealed.

To supply a statement of facts, we are by consent of parties, referred to the facts assumed by the judge of the probate court, in the opinion by him pronounced, and to the testimony of J. Gray, which comes up with the record. From these sources of information, we discover that Moore intermarried with the plaintiff in the Mississippi territory; that they both had, at the time of said marriage, property, consisting principally of slaves; that the husband had more than the wife; that they purchased a landed estate in the state of Louisiana, and removed to it; which they afterwards sold, and bought another; which was also sold; that Moore died out of this state; but that all the property, the half of which is now claimed by the appellees, as belonging to the community of acquets and gains, according to the provisions of our laws, is found within the jurisdiction of this state.

Every marriage, according to our laws, superinduces, of right, partnership, or community of acquets and gains. *Civil Code*, 336,

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art. 63. And at the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common acquets or gains, unless they satisfactorily prove which of said effects they brought in marriage, or have been given them separately, or they have respectively inherited. *Id. art.* 67.

The whole estate, of which a partition is claimed by the present suit, being within the jurisdiction of the state of Louisiana, must be distributed as directed by its laws, unless the evidence shew clearly that the court ought to give effect to the laws of some other state, and unless that law be proven, as foreign laws are required to be, and establishes rules different on the subject from the *lex fori*. There is not a fact established (except the marriage of Moore, and the plaintiff, having taken place in the Mississippi territory) which has the least tendency to impede a full operation of our laws on the case. But we are not able to perceive, in what manner this circumstance can change the situation of the parties, in relation to property acquired in this state, and found on the dissolution of the marriage, still under the control of its laws.

There is nothing in the evidence which proves, that any of the effects which were possessed by the husband and wife, are the separate property of either, as having been brought in marriage, or acquired by a particular title, which would exclude them from the community of gains. In a word, there is nothing in the whole case, which can take it from the government of the law of this state; according to which, it is evident, that the whole estate must be considered as common property of the husband and wife, and distributed accordingly.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded, with directions to the judge of probates to proceed to a partition of the estate, according to the laws of this state, and that the appellees pay the costs in the district court and the costs of this appeal.

Eustis and *Colt* for the plaintiffs, *Duncan* for the defendants.

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SHREVE vs. HIS CREDITORS

SHREVE vs. *HIS CREDITORS.*

APPEAL from the court of the first district.

The act of 1817 (relating to insolvents) does not deprive persons who have not a year's residence of any right which they had before.

MARTIN, J. delivered the opinion of the court. It does not appear that the act of 1817, deprives the applicant of any right which he had to avoid imprisonment by a surrender of his property. It is true, he is precluded from claiming any benefit of this act, by its 39th section; as he has not a year's residence in the state. But we cannot conclude, that from the sole declaration of the legislature (that persons, who have not resided one year in the state are not to enjoy the benefits of this act) they are to be considered as deprived of a right which another act gives them.

The act has no repealing clause. It provides in the first section, that every individual, not yet imprisoned for debt, may avoid imprisonment, by surrendering all his estate; provided the surrender be made *bona fide* and without fraud, agreeably to the formalities prescribed by this act.

The second section, and the following, detail the formalities which every one who shall wish to avail himself of the benefits of this act is to follow, and the nature of the

relief which a compliance with these formalities will give him a right to.

It is foreign to the question before us, whether a person, whose residence entitles him to avail himself of the benefit of the new act, is deprived by it from claiming the like benefit (or one of a similar nature) which the new act presents, if he had before, any other legal mode of acquiring it. But admitting, that as to such a person, the former law is repealed by implication, because the act of 1817, and the one which provided the like relief before, cannot stand together; it does not follow, that a person who, for want of residence, cannot avail himself of the new mode of relief, who is mentioned in the act, or the only part of it which declares this incapacity, is necessarily to be considered as bereft of the right which he had before to the former mode of relief, under another act.

Admitting that it is inconsistent, that persons who have the residence required, should avail themselves of the former act, and so it cannot stand with the latter as to them, which consequently repeals it; the same conclusion does not follow as to those, whose want of residence incapacitates them from availing

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themselves of the new law, which, in our view of the question, cannot as to them, affect the old one.

If a statute declares, that larceny shall be punished by thirty or more lashes, and another be made, declaring that the punishment of larceny shall be five-and-twenty lashes, the former is repealed: for both cannot stand together; but if, by a clause of the latter, slaves are declared not to be within it, surely the former statute, though repealed as to free persons, will remain in force as to slaves.

It is therefore ordered, adjudged and decreed, that the judgment ought to be annulled, avoided and reversed, and the case remanded, with directions to the judge to proceed according to law.

Duncan for the plaintiff, *Livermore* for the defendants.

BALDWIN vs. *PRESTON*.

An attorney who undertakes to collect a debt out of the state, and makes his agent known, is not liable for any accident which happens in consequence of the agent's death.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff charges, that in March, 1820, the defendant received from him a check on the bank of Kentucky, for collec-

tion; that he has collected its amount, and refuses to pay it over.

The defendant answered, that in March, 1820, he received from the plaintiff, a check of the bank of Orleans, on that of Kentucky, for six hundred dollars, for collection; that he advised the plaintiff, who authorised the money to be obtained from the bank of Orleans, that this could not be done; whereupon the defendant was requested to send the check to Kentucky for collection; that he therefore forwarded it to William Preston, a person of good character, to whom the defendant entrusted his own business, and who was named to, and approved by the plaintiff; that the defendant heard nothing from Wm. Preston for a considerable time, when said William wrote that sickness had hitherto prevented his attention to the collection of the check; that he was on his way to Virginia, would collect the money and deposit it in the bank at Frankfort, which was done; that the defendant sent his own check to Charles W. Taylor, to receive and forward the money; but as it was deposited in William Preston's name, the check was not paid; that said William is since dead, and the money

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still remains in the bank at Frankfort; that the original check being payable in Kentucky bank notes, and such notes having been received and deposited by William Preston; the defendant, in order to stop the unfounded complaints of the plaintiff, contracted for notes of the bank of Kentucky, and offered to pay in such notes, or to procure them.

There was judgment for the defendant, and the plaintiff appealed.

Fitzhugh, a witness for the defendant, deposed, that he believes the late William Preston received in March or April, 1820, for collection, the check mentioned in the petition: that the cashier of the bank of Kentucky told him, that such a check was handed into the bank by W. Preston, with directions to pay the amount to his or A. Gales' order. The witness knew William Preston; he bore a good character, and was trust-worthy. He was much indisposed, and unable to attend to business in the summer of 1820. The witness saw the entry on the books of the bank, relative to the check; the money is still there in deposit. William Preston went to Virginia, and the witness believes

he died in the winter of 1820 or 1821.— The witness has seen the defendant's letter and check, to Charles W. Taylor, who was directed to apply the proceeds to the payment of some land in Indiana. The cashier of the bank told witness, that the money was not paid to Taylor, because it was deposited in Wm. Preston's name. It is still in the bank. The bank of Kentucky stopped specie payment in January, 1820. If specie could be recovered from the bank of Kentucky, on the check, the witness believes it could on its notes. The money was still deposited in the bank on the first of this month.

Bingey deposed, that the plaintiff informed him he was desirous of being informed of the proper mode of collecting a check of the bank of Orleans, on that of Kentucky; and the witness recommended to him to employ the defendant, and the plaintiff afterwards informed him that he had done so, and the defendant had sent the check to William Preston, in Kentucky.

E. Allen deposed, that A. Gales, to whom the check, from the bank of Orleans, was originally payable, owed her about $400, and she was to be paid out of the proceeds of the

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check; the plaintiff informed her, he had employed the defendant to collect the amount of the check, and that the defendant had sent it to Wm. Preston. The plaintiff lately told her the defendant offered to pay in Kentucky notes, which the witness declined receiving.

The cashier of the bank of Orleans deposed, that about a year ago, the defendant presented a check of that bank, on that of Kentucky, originally payable to A. Gales, then in the possession of the plaintiff. Payment was refused, as it had not been returned within a reasonable time, having been drawn 18 months before—about ten days before, the same check was presented by the plaintiff, who said payment had been refused in Kentucky, on the ground of a check of the same amount having been paid, but he believed the reason was, they did not wish to pay specie. The bank of Kentucky continued to pay specie for about a year after the check was drawn; but a few months before the plaintiff presented the check in New-Orleans, it was known there, that the bank of Kentucky had ceased to pay specie. With a great deal of trouble Kentucky notes might be disposed of at three per cent. discount.

The plaintiff admitted on record, that the check, in the petition was, on presentation, by William Preston, carried to his credit, and that the money is still in deposit there.

The plaintiff was aware that the defendant did not undertake to collect the amount of the note himself, and the agent, he employed for that purpose, was known to the plaintiff. Untoward circumstances, not within the control of the defendant, have prevented the money from coming into his hands. It is true, he made an unsuccessful attempt to obtain it, with the view of its being applied to his own concerns. This he might lawfully do, and the moment the money would have been in his agent's hands (Taylor's) he would have been accountable to the plaintiff. In this, however, he has failed, and it is admitted, that the money is still deposited in the Kentucky bank, as William Preston left it. Surely the defendant has been guilty of no latches, of no improper conduct, and the plaintiff ought not to recover.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff. *Eustis* for the defendant.

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THE STATE vs. *THE ORLEANS NAVIGATION COMPANY.*

APPEAL from the court of the first district.

See the judgment at a succeeding term.

Preston, for the state. The defendants appear to treat this cause with contempt. It seems as if they condescended to the formality of appearing here, only to see us condemned. I know the court will entertain a different disposition; a disposition to regard this suit as the serious complaint of a great many poor people, who in their hearts believe, that an exorbitant tax is exacted from them without the authority of law.

I must ask for the patience of the court, and think I have a right to expect it, because the case now to be decided, is one of no ordinary importance. The bayou St. John is the natural highway to market, of a cotton country, two hundred miles in length and breadth. It costs that country one-fourth as much to transport their cotton across lake Ponchartrain (a distance of thirty miles) as across the Atlantic. The cause is, the exorbitant tonnage duty exacted from the vessels of transportation.

The planters, within fifty miles of Madison-

ville, compelled by such an exaction, are beginning to send their cotton to Mobile.— I lately read, with astonishment, in a New-York paper, a report of the commerce of that city, with this country, during the last year. Sixteen thousand bales of cotton were reported to have been imported from Mobile, and but the same quantity from New-Orleans. Nearly as many vessels were advertised for that port as for this. But for the tonnage duty exacted by the Navigation Company, almost the whole of that cotton would have been sold here, those vessels would have been advertised for this port. To enrich about thirty individuals, our cotton merchants are sacrificed, the prosperity of our city is sacrificed, our sources of wealth are driven from their natural channels.

But for the tonnage-duty paid the Navigation Company, lake Ponchartrain would be covered with wealth and industry; it is now navigated but by a few schooners, the owners and commanders of which are condemned to poverty. I know a single schooner, of 30 tons, which paid the company fifteen hundred dollars the last year. A steam-boat was lately introduced on the lake, to the incalculable

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convenience of the thousands who annually cross. She offered to compromise her tonnage duty with the company, at two thousand dollars a year; they refused, and she was driven from the lake. It seems as if the avarice of the company emulated the folly of him who killed his goose, that laid golden eggs, to get them all at once.

The distress in which the duty has involved a large portion of our citizens, on the other side of the lake, is incredible to those who have not seen it with their own eyes. All the profits of their labour, which ought to feed and clothe their children are swallowed up by the company.

There is not a man or woman in this city who is not tributary to the company. Our eggs and butter at breakfast, our meats at dinner are dearer, because there is not a vessel which transports them to market that is not taxed. Fire wood is but two dollars a cord on the bank at Madisonville, (almost within sight of this hall in a clear day) it is seven dollars at the basin.

If this state of things is sanctioned by law we must submit, we must shut our ears to the complaints which every breeze wafts from

the Floridas, Alabama and Mississippi, until legislative omnipotence affords relief. Such a state of things, no doubt, was intended by those who granted the charter, more perhaps for their own benefit than the public weal. But it often pleases a good God to confound those rulers who use power for their own emolument, and to protect the oppressed by the blindness of their oppressors. We will see if we may not thank God for such protection on the present occasion.

The object of the present proceeding is, to enquire into the constitutional validity of the charter of the Orleans Navigation Company. The company are required by the state, to shew by what authority they claim to be a corporation, and to exact tolls from the citizens of this state, and other persons navigating the waters of the bayou St. John and canal Carondelet. They answer that on the 4th day of March, 1804, an act was passed by the congress of the united states, entitled, "an act erecting Louisiana into two territories, and providing for the temporary government thereof;" that by virtue of the powers granted by the 4th section of said act, the governor and legislative council of the territory of Orleans

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did, on the 3d day of July, 1805, enact a law, entitled, "an act for improving the navigation of the territory of Orleans," which act organised the company, and gave them the powers and privileges which they claim and exercise.

The first enquiry which this answer presents, is this, where did congress derive the power of "providing for the government of the Louisiana territory?" For, if congress have no power to govern the territories of the united states, their acts for the government thereof are null. In the first grade of territorial government (which is the government in question) the people of the territory are not represented in the congress which governs them. Congress provides for their government, not a legislature of their choice, but a governor and legislative council appointed by the president of the united states. The government is imposed on the governed, without their consent; there exists no relation between them and the government, but obedience on their part, and power on the part of the government. If congress possess this power, they derive it from the constitution of the united states, because they were created by that constitution.

In ascertaining whether the constitution of the united states has given the power in question to congress, it will assist us to reflect on the circumstances of the country prior to the formation of the constitution, and the character of the men who formed it; for the constitution was but the result of that character, applied to those circumstances. Our ancestors had just terminated the war of independence. The great object of that war, and which enveloped all other considerations, was to resist the pretention of Great Britain to govern us, as her colonies or territories, by laws imposed *without our* consent. Our bill of rights was the declaration of war. That instrument sanctified these principles, "that governments derive their just powers from the consent of the governed"—that "the right of representation, is inestimable to the people, and formidable to tyrants only;" it denounced, as an intolerable grievance, that "the government of Great Britain had imposed taxes upon us without our consent, and had declared itself invested with power to legislate for us, in all cases whatsoever." To combat these pretentions, to establish these rights, our ancestors struggled through a war of seven years, cha-

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racterised on our side, by sufferings rarely experienced, even in revolutions. It almost literally covered the land with the blood of our fathers, and the tears of our mothers. At the close of that war, the selectest patriots who conducted it, assembled to form a constitution for the government of the people. Is it credible that they established, for the government of our colonies or territories, the very government which Great Britain had exercised over us as her colonies, the same tyranny *they* had combated, and to which they had, by their example, instructed men to die rather than submit? If it be found in the constitution, in words that cannot be mistaken, I must yield. But, at the same time, I would cynically regard all pretentions to patriotism as hypocrisy, and all men as equal tyrants, when they have equal power. And if the patriots of the revolution denounced the character of George the third, as *marked by every act which may define a tyrant;* I would denounce George Washington (God forgive the irreverence) in the same manner. But I will prove that the patriots who reared our conititution, did not engraft, on that tree of liberty, a germ of despotism.

I look in vain for any clause in the consti-

tution, authorising congress to "provide for the government of the territories of the united states." They are empowered to exercise legislative powers over a territory ten miles square, established as the seat of government, and over places purchased for forts, magazines, arsenals, dock-yards, and other needful buildings; but this is the constitutional extent of their legislative powers, except, on national subjects. The government of the territories is a *casus omissus* in the constitution. In the magnitude and multiplicity of their concerns, that subject did not occur to the convention. If they had formed a perfect constitution, providing for every case, they would have been gods and not men. They provided a mode of amending its imperfections, of which, the failure to provide for the government of our territories, is one.

The only clause in the constitution of the united states, which gives coloring to the exercise of the power in question, is in the following words, "congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the united states." The terms and spirit of this clause, relate to pro-

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perty alone, and not to people. Congress have power to dispose of what? Of people? No, but of territory. They are authorised to make all needful rules and regulations respecting the territory, *or* other property. The copulation of territory with other property, by the connective *or*, shews that property alone was meant by territory, and not people. If the convention had intended to grant to congress legislative powers over the people of the territories, they would have used the terms contained in the 16th power of congress, "to exercise exclusive legislative powers in all cases whatsoever," over the place selected as the seat of government. The use of such ample terms where legislative powers are granted, excludes the idea that they were intended to be granted where no such terms are used.

If the convention had intended to give congress the power to dispose of the life and fortune of a single citizen, they would have said so in unambiguous terms, they would not have left the subject doubtful with regard to all the people of all our territories. I am supported in my opinion, with regard to this clause of the constitution, by the construction of cotempora-

neous writers. *Federalist, v.* 1, 286. *Tucker's Blackstone, vol.* 1, *part* 1, *appendix*, 283.

Congress have power "to make all laws which shall be necessary and proper for carrying into execution the powers vested in the government of the united states." But, is a law providing for the government of the people of the territories of the united states, *necessary and proper* for carrying into execution the power "to dispose of and make all needful rules and regulations with regard to the territory, or other property of the united states?" No one can pretend it; they are different and unconnected subjects of legislation. The power granted by the constitution, is to administer and dispose of property; the power claimed and exercised by congress, is that of governing people in all the relations of social life. The one power has no relation to, or connexion with the other.

Is the power to govern the territories of the united states a necessary and proper incident of the power to make treaties? Then the president and senate of the united states should have governed Louisiana, and not congress. Is it a necessary and proper incident

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of the power to declare war? But Louisiana was not acquired by conquest, and surely the exercise of the incidental power cannot exist, without the exercise of the power to which it is incident. Is it a power necessarily incidental to severeignty? But the sovereignty of congress is restricted; "the powers not delegated to the united states by the constitution, nor prohibited by it, to the states, are reserved to the states respectively, or, to the people." Now, in that constitution, no man, not determined to find it, can discover the delegation to the united states of power to provide for the internal government of the people of the territories of the united states. It is therefore reserved to the people.

The consequences of the decision, that congress have no power to govern the territories of the united states, will be pressed on the court as a strong argument against it. The argument *ab inconvenienti* can have no weight in a question strictly of constitutional law. The constitution must stand until every thing else falls. It is the anchor on which every man in America has cabled his life, his liberty, his fortune and his hopes, and woe be to him who parts a strand of the cable. But he

who reflects, will see all the evil consequences in the exercise of that power. The case before the court is a signal example. A part of the people of our state are subjected to an exorbitant, interminable tax, to which they never consented by a representative in congress, because they had none, and which was not imposed by a local legislature of their choice, but by a governor and thirteen inhabitants of Louisiana, selected by the president of the united states; a tax, which must necessarily create a monied aristocracy of those who enjoy it, because they are allowed fifty per cent per annum, on their capital for ever; and as necessarily condemn the subjects of it, and their children's children, to plebian poverty.

If I am asked how are our territories to be governed, it is not material to my argument to answer the question; but the answer is obvious—by the will of the people—because "the power is reserved to the people." Nothing is easier, in the humblest state of society, than for the people to organize a republican government, appoint their legislative, judicial and executive officers, and in every respect exercise and submit to a government of the people. This is the only government consist-

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ent with the principles of liberty, and the spirit of our constitution; its letter authorises no other. The exercise of government, over our territories, by the congress of the united states, is therefore an unconstitutional usurpation of power. The consequence is, that the acts of congress, in the exercise of that power, are unconstitutional and void. Under one of these acts, the defendants claim their existence as a corporation, and the privileges we contest. The act itself must fall, and with it the superstructure they have built upon it.

But if I am wrong, and the people of the united states have delegated to congress the power to govern the territories of the united states, I maintain, in the next place, that congress cannot delegate that power to a sublegislative body. The constitution of the united states declares, that "all legislative power shall be *vested* in a congress of the united states." This *vested power* cannot be transferred by congress. Legislative power, in its nature, is not transferable. The people have consented to obey laws enacted by their representatives alone, and not by any other body. The people have authorised congress to declare war; can congress, without their au-

thority, delegate this power to any other legislative body? Congress are impowered to impose taxes, to provide for calling out the militia of the united states; could congress delegate these powers to the governor and legislative council of the Michigan territory? And would the state of New York collect a tax, or the governors of the different states move their militia, under the authority of laws passed by the legislature of that territory? In the case of the heirs of the late governor Claiborne, against the police jury of the parish of Orleans, this court intimated their opinion, that legislative power could not be delegated. 7 *Mart. Rep.* 5, 6, 7. Many years ago it was contemplated to establish a local legislation for the district of Columbia, but the opinion that congress could not delegate the powers intrusted to them, prevailed, and the project was abandoned. 1 *Blackstone, vol.* 1, *p.* 277 & 8, *appendix.* In fact, it is a legal and political maxim, *delegatus non potest delegare.* Congress could not therefore delegate their powers to the governor and legislative council of the territory of Orleans, and the acts of that body, in the pretended exercise of such delegated powers, are nullities.

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But, if I admit that congress had the powers in question, and could delegate them, at all events, those powers could be exercised only in conformity to the constitution of the united states, not in violation of it. By the 9th section of the company's charter, a tonnage duty of one dollar per ton is imposed upon every vessel passing in or out of the bayou St. John; and under this authority, the company exact a tonnage duty from the vessels of all the different states in the union, entering the port of the bayou St. John. But, says our constitution, "no preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." *Const. U. S. art.* 1, *sec.* 9, *n.* 5. This article of the constitution expressly prohibits congress, and (a *fortiori*) those to whom congress delegate their powers, from imposing duties on the vessels of one state bound to the ports of another state; and from giving in any manner, a preference to the ports of one state over those of another. And yet, in direct opposition to this provision in the constitution, it is pretended, that congress possessed the power,

d have granted it, through a sublegislature, the Navigation Company, to exact duties n vessels bound from the other states of e union to this state; and to give a prefer- ce to the port of the bayou St. John, over other ports in the union, by imposing du- s upon vessels entering it, which are not posed upon vessels entering any other port the union.

To avoid the force of the argument derived m this clause of the constitution, the defen- nts have exerted every effort to prove that e bayou St. John was not a navigable stream the period of the organization of the Navi- ion Company; from whence they would nclude (to meet our argument) that the you St. John was not a port, and that ves- s could not be bound to or from it at that riod. The company are estopped by their arter, from maintaining that the bayou St. n was not a navigable stream at the time was granted. For the very clause, author- g them to demand a tonnage duty provides, t they may demand it when they shall have proved the navigation of the bayou, so as admit such and such vessels. That cannot improved which does not exist. If no na-

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vigable stream existed there, one might
made, but could not be improved. And
fact, all their testimony tended to prove th
melioration and improvement of that navig
tion, not its non-existence.

The only definition I can conceive of a n
vigable water, is that which is and may b
used for navigation. The navigation may b
difficult and interrupted, on account of wind
logs, or bars, but if the water be habitual
used for navigation, it is a navigable wate
Let us test the navigation of the bayou S
John, at and before the organization of t
Navigation Company, by this definition. It
matter of history, that the first settlers
Louisiana entered the country through t
bayou St. John, and the first settlements we
made there. In 1699, Bienville came fro
Dauphin island to the bayou St. John, and
tradition says, eat his first dinner in Lou
ana, on the island Bienville, so much spok
of in the testimony. The memory of C
laume Benite serves him forty years ago,
which time small schooners navigated
bayou. At and before the epoch in questi
(1805) all the witnesses concur, that from fo
to fifty schooners navigated lake Ponchartr

they traded from the bayou St. John to Galvestown, Springfield, Tchefoncta, La Comba, Bonfaca, the bay of St. Louis, Mobile, Pensacola, and Apalachicola. From these places they brought to New-Orleans, wood, tar, pitch, lime, provisions, and other productions of the country, and received merchandise in return. Those vessels experienced more difficulty from the bar outside of the bayou, some distance in the body of the lake (certainly a navigable water) than in the bayou itself. The water on the bar, at ordinary tides, was about thirty inches deep; the passage was difficult, and large vessels were discharged and re-loaded in passing over. In high tides they sailed up to the bridge, with their cargoes on board, and even to the basin. Those tides are produced by the winds from one half of the horizon; and those winds prevail particularly in the fall, winter, and spring, when the navigation of the bayou is needed for commerce. The southern winds, which produce low tides, prevail in the summer, when the vessels are laid up for want of employment. Pierre Baum, with a schooner drawing three feet water, always unloaded at the basin. Vincent Rillieux's schooner, which

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was still larger, sailed into the basin after the company had been organized, but before they had improved the canal. He is certain of the time, because he brought wood for the forts under the orders of general Wilkinson. All the schooners trading on the lake, ordinarily moored at the bayou bridge, unloaded and received their cargoes there. Vessels were there constructed, repaired and fitted out for sea. They were sometimes indeed, detained for days at the bar in lake Ponchartrain, but ordinarily voyages were as regular then as at present. José Picheraca, a witness for the company, testifies, that the Spanish government fitted out a military expidition, in vessels, which sailed from the bridge. the Baron Carondelet ordered him, as a king's pilot, to bring a Spanish gun-boat into the bayou, which was done. The testimony then establishes incontestibly, the navigableness of the bayou St. John, at the period of the organization of the company. The imposition therefore, of a duty on the vessels of other states entering it, was and is, an open manifest violation of the article of the constitution of the united states, which I have quoted.

The bayou St. John was also a port of the

united states. It was expressly constituted such by act of congress, a year before the organization of the Navigation Company, see *Dig. Laws of the United States, vol.* 3, *p.* 571. The preference therefore given for or against this port, by the imposition of duties on vessels entering it, which are not imposed on vessels entering the ports of Boston, New-York or Philadelphia, is in direct opposition to the same article of the constitution of the united states.

Again, congress have power "to lay and collect taxes, duties, imposts, and excises;" but the very clause of the constitution which gives them that power, prescribes, that "all duties, imposts, and excises, shall be uniform throughout the united states." Under this article of the constitution, congress can impose a general, uniform duty on all vessels entering all the navigable waters and ports of the united states. But they are expressly prohibited from imposing a duty upon vessels entering one navigable stream, or port, which is not equally imposed upon all vessels, entering all other navigable streams or ports. The duty of tonnage imposed by the governor and legislative council of the territory of Orleans.

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under the authority of congress, on vessels entering the bayou St. John, is not a uniform duty throughout the united states. It is imposed particularly and exclusively on vessels entering that bayou, and extends to vessels entering no other water of the united states. It is therefore an unconstitutional duty. In fact, it is of the very spirit of our government, that congress should act upon national subjects, and draw upon the purse of the nation, to effect the objects of their legislation. They cannot tax particular individuals, or sections of the country, for particular purposes.

I have so far contested the *authority of congress* to impose the tonnage duty in question. But, if congress possessed the power, and could delegate it to a sublegislature, the next question is, did congress delegate it to the governor and legislative council of the territory of Orleans? They delegated "legislative powers to said body, to extend to all rightful subjects of legislation; but no law was to be valid which was inconsistent with the constitution and laws of the united states; and the said body was expressly prohibited from exercising power over the primary disposal of the soil of the united states." *Vol.* 3.

Dig. Laws of the U. S. p. 604. Now I shall endeavour to shew that the powers granted by the governor and legislative council, to the Orleans Navigation Company, were not "right ful subjects of legislation;" that they were "inconsistent with the constitution and laws of the united states," and that, "*the soil of the united states* was *primarily disposed of*" to said company.

In granting their charter to the Orleans Navigation Company, the governor and legislative council of the territory of Orleans, so far as they disposed of the navigation of the bayou St. John, and the soil of the united states, did not legislate upon s rightful subject of legislation. On this part of the controversy, I maintain, that the bayou St. John was the public and common property of the united states, free for the use of all the citizens thereof; that the use of it could not be alienated by congress, and *a fortiori* could not by the territory of Orleans.

The bayou St. John is a navigable water of the united states, communicating with the sea. It is a fundamental law of all nations, with whose laws on the subject, I am acquainted, that navigable waters are the common property of the nation, and cannot be alienated

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by the government. Our *Civil Code* declares, that "public things are those, the property of which belongs to a whole nation, and the use of which is allowed to all the members of the nation. Of this kind are navigable rivers, sea-ports, roads, harbours, highways, and beds of rivers, as long as the same is covered with water. Thence it follows, every man has a right freely to fish in the rivers, ports, roads, and harbours. The use of the shores of navigable rivers or creeks is public. Accordingly every one has a right freely to bring his ships to load there." *Civil Code*, *p.* 94, 96. The law of Spain, on this subject, may be learned from the 3 *Partida*, *tit.* 28, *lib.* 6. *Los rios e los puertos e los caminos publicos pertenecen a todos los omes comunal-mente, en tal manera que tambien pueden usar dellos los que son de otra tierra estraña como los que moran, e biuen en aquella tierra, do son.* The law is the same in France. I refer the court to an ordinance, *dés eaux et forets* 1669, *qui accorde au Roi la proprieté de toutes les fleuves et rivieres navigables.* An edict general of the kingdom, 1693, commences in these terms, *le droit de proprieté que nous avous sur tous les fleuves et rivieres navigablés etant incontestables.* See also *Poth. Traité du droit de proprieté*, *n.* 52,

and *Domat, liv.* 1, *tit.* 3, *sec.* 1, *n.* 5. The *Napoleon Code, sec.* 538, declares, *les fleuves et rivieres navigables ou flottables les rivages &c. sont consideres comme les dependances du domaine public.* By the law of England, navigable rivers are a prerogative of the king. See 1 *Black. Com.* 264. *Lord Hale*, in his tract *de portibus maris, chap.* 7, quotes, as English law, this passage from *Bracton, lib.* 1, *chap.* 12, *sec.* 6, *quod publica sunt omnia flumina et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparium etiam usus publicus est jure gentium sunt ipsius fluminis.* These are the very words in which the Roman law is laid down in *Justinian's Institutes, book* 2, *tit.* 1, *sec.* 2, 4. As to the manner in which this subject is regarded in the united states, I cannot quote abler and better authority than from the pen of Mr. Jefferson; "as to the bed of rivers," says he, "there can be no question, but that it belongs purely and simply to the sovereign as the representative and trustee of the nation. While it is occupied by the river, all laws, I believe, agree in giving it to the sovereign, not as his personal property, to become an object of revenue or of alienation; but to be kept open for the free use of all the indivi-

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duals of the nation." See *Hall's Law Journal*, 58, 59. *Vattel* is an author who wrote for all nations. In a few words he developes the principles which govern this subject, which can be defended, and which are peculiarly applicable to the case before the court. "The nation," says he, "being the sole mistress of the property in its possession, may dispose of it as she thinks proper, alienate or lawfully mortgage it. The prince or the superior of the society, whatever he is, being naturally no more than the administrator, and not the proprietor of the state, his authority as sovereign, or head of the nation, does not of itself, give him a right to alienate or dispose of the public property. The general rule then is, that the superior cannot dispose of the public property, as to its substance. If the superior makes use of this property, the alienation he makes of it, will be invalid, and may, at any time, be revoked by his successor or by the nation." The author then admits, that the nation may authorise its sovereign to dispose of the public property strictly so called, but in the preceding paragraph marks a strong distinction between the public property of the nation, strictly so called, and

the public property for the common use of all the people thereof, and maintain, that the latter ought not to be alienated but under the most pressing exigency. *Vattel's Law of Nations*, *n.* 258.

I derive from the foregoing authorities, that the navigable water called the bayou St. John, was the public property of the united states. It was not only public property, but common for the use of all the people of the united states. The public property, strictly so called, consists of the national territory, which cannot be used but by appropriation, the public vessels, the contents of the public stores, magazines and arsenals. This property, the people of our nation have granted to congress the power of alienating. *Const. U. S. art.* 4, *sec.* 3, *n.* 2. The property common to all the citizens of the nation is different. This consists of navigable waters, ports, harbours, &c. the value of which consists in the common use of every body. Property of the latter description, the people have not authorised even congress to alienate. Could congress grant the river Mississippi to a company; sell the port of New-York or occlude the harbour of Boston? If congress could not, it will hardly be pre-

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tended, that the governor and legislative council of the territory of Orleans could.

It may be said, that the bayou St. John has not been alienated, but only a duty of one dollar per ton, imposed in favor of the company, on vessels entering it. If a duty of one dollar per ton can be laid, not in favor of the nation, but of a company, a like duty of fifty dollars per ton may, in principle, be equally imposed. Such a duty would be a complete alienation to the company, by excluding vessels from the bayou. The imposition of a duty of a dollar per ton, in favor of a company, is therefore so far the alienation of the use of the property, which property is valuable only for its use, and therefore so far a violation of principle. It is an invalid alienation, because of that which congress have no right to alienate. The free use of that bayou is therefore still in the nation. Congress may impose duties on that use, but those duties must be imposed in favor of the nation. This is what we require; we are sure that the nation will not demand fifty per cent. on the benefits she confers, but only an equivalent for them.

But whatever congress might do with re-

gard to the navigable water in question, the governor and legislative council of the territory of Orleans could not legislate upon the subject at all; because it did not belong to them, and the nation, to whom it belonged, had not confided to them the power of making regulations with regard to it. The strongest advocate of the constitutional powers of that body, will agree with me that it was provided, merely to supply the place of a state legislature, and could not rightfully legislate upon any subject, with respect to which, a state legislature could not. It was provided for the internal government of the territory. Congress never intended to give to that body, the right of legislating upon the great and general concerns confided to her by the nation. She retained the right of exercising her powers over those concerns, with regard to the territory of Orleans, in the same manner that she exercised them with regard to the different states in the union. Could the government of the territory have leased the public lands, rented the magazines, arsenals, and navy yards of the united states, or chartered their ships? If these, un-

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der the grant of congress, would not have been regarded as rightful subjects of territorial legislation, how can we regard differently the alienation or incumbrance of the public waters of the united states.

The governor and legislative council of the territory of Orleans then, in making so important a regulation respecting the navigable water in question, as that of imposing a duty on the use of it, did not legislate upon a rightful subject of legislation. They transcended the powers granted them by congress. The consequence results, that the duty imposed by them is a nullity, and the exaction of it must be prohibited.

I have said that the governor and legislative council of the territory of Orleans, in imposing the tonnage duty in question, passed a law "inconsistent with the constitution and laws of the united states."

1. Their act in doing so was inconsistent with the provision of the constitution, which gives congress the power "to make all needful rules and regulations respecting the property belonging to the united states." *Con. U. S. art.* 4, *sec.* 3. I have shewn, by authorities, that the navigable water in question

belongs to the people of the united states. They have confided to congress "the power to make all necessary rules and regulations respecting it." To rebut the idea of any binding exercise of that power, by the governor and legislative council of the territory of Orleans, it would have been sufficient to have shewn that the people of the united states, by their constitution, had not granted the power to that body. But when the people of the united states, the owners of the property, have not been silent on the subject, but have confided its regulation to another legislative body, it dissipates every shadow of pretence, for the exercise of that power, by a legislative body, in whom that confidence has not been placed.

2. The imposition of the duty in question, was inconsistent with the constitutional power of congress "to regulate commerce with foreign nations, and among the several states." *Const. U. S. art.* 1, *sec.* 8. It is a duty imposed on the vessels of foreign nations, upon the vessels of the several states entering a port of Louisiana. It is therefore strictly a regulation of commerce, imposed by a legislature, to whom the power

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was not confided, and we ought to suppose, in opposition to the will of congress; because, the power being committed to them, they have not acted on the subject.

The exercise of power, to regulate commerce, by two distinct legislative bodies, must necessarily be inconsistent. *Ecce signum* in the case before the court. The governor and legislative council of the territory of Orleans, have made a regulation of commerce as unalterable, it is pretended, as the laws of the Medes and Persians; and yet the constitution informs us that congress can alter it, can regulate the subject just as she chooses, and when I open the laws of the united states, I shall shew, has not only altered, but abolished this pretended regulation. Even when the imposition of any duties are permitted to the states, the constitution has cautiously subjected the laws imposing those duties, to "the revision and control of congress." *Const. U. S. art.* 1, *sec.* 10.

3. The tonnage duty in question, is inconsistent with the clause in the constitution of the united states, which declares that "no state, without the consent of congress, shall lay any duty of tonnage." *art.* 1, *sec.* 10. The governor and legislative council of the terri-

tory of Orleans have laid a duty of tonnage, in the strictest sense, and have authorised the Navigation Company to collect it. They have declared, "that as soon as the company shall have improved the navigation of the bayou St. John, so as to admit, at low tides, vessels drawing three feet water, from lake Ponchartrain to the bridge, at the settlement of the bayou, then the president and directors of the company shall be entitled to have, ask, and receive, from every vessel passing in or out of said bayou, a sum not exceeding one dollar for every ton of the admeasured burthen of said vessel, and so in proportion for every boat, of a burthen of less than one ton." *sec.* 9, *of the charter.* The next section prescribes the mode of measuring, and ascertaining the tonnage of vessels passing through the bayou. A duty then has been laid upon vessels navigating the bayou St. John, by the governor and legislative council of the territory of Orleans. For reasons already urged, if that duty cannot be imposed by a state, it cannot be laid by a territory. On that subject, I may add, that the reason of the article of the constitution under consideration, applies as forcibly to territories as to states.

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But, if the company should still attempt to shelter themselves under the letter of the constitution, and make a distinction between its application to states and territories, where, regarding its spirit, no distinction exists, the shift cannot avail them at this period. We are now a state, and no duty of tonnage can exist in the state of Louisiana, consistently with the constitution of the united states, without the consent of congress. The duty in question is a duty of tonnage. It is so described by the charter of the company. *sec.* 9 & 10. It is imposed on all vessels domestic and foreign. It is imposed for a public purpose, the improvement of a national navigation for external commerce. It differs from tolls upon roads, bridges, and canals; these are imposed for the internal commerce and convenience of the states. It is not a mere *quantum meruit*, because the company are allowed fifty per cent. on their capital, and the rest of the duty goes to the state treasury. I see no solid distinction between it and the ordinary duty of tonnage, imposed by congress, on vessels using the waters of the united states. It has been imposed without the consent of congress, pre-

viously or subsequently given. It will not be pretended that there has been an express consent on the part of congress. But I do contend, that the consent must be express, or the duty is not imposed according to law; and that, until the consent is expressly given, it is exacted without the authority of law. It is expressly required by the constitution. A state of inaction, where neither assent nor dissent is given, will not satisfy this express requisition, because, to the validity of the duty, a state of action, a consent given, is required. It might as well be pretended, that an act of the senate and house of representatives, would be binding, without the signature of the governor, or, that the consent of the governor might be implied, because he did not approve or disapprove the bill. As having a bearing on this point, I refer the court to 1 *Poth. Oblig. n.* 11, *Brogniez* vs. *Villeré*. 3 *Martin*, 326 & 502, and the case of *Miltenberger* vs. *Cannon*. 10 *Martin*, 85.

The argument in opposition is this:—the governor of the territory was required by the act of congress, to report the acts of the governor and legislative council, to the president of the united states, to be laid be-

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fore congress, which, if disapproved of by by congress, were to have no force. It is said this act was not disapproved of by congress, and therefore, it was approved, and is in force. This is a *non sequitur*.— If the governor and legislative council had passed an act to convert my property to your use, to ostracise ten citizens, or decimate the people of the state, these acts would not have had force, nor have been executed by the judges, although not disapproved by congress. It is true, that ordinary acts of legislation were to have force, if not disapproved, but not acts to the effect of which, the express consent of congress was essential, because expressly required by the constitution. If any state, at the present day, should impose a tonnage duty, would the judiciary enforce that duty until the consent of congress was expressed by an act of congress? Would they admit an implied approval and consent of congress because it was not disapproved? They would not, because they had sworn to support and enforce the article of the constitution which I have cited.

If we yield implicitly to the opinions of great judges. long expressed on points di-

rectly before them, we ought to give equal confidence to the opinions of great legislators, often reiterated on subjects peculiarly confided to them. The congress of the united states is the most enlightened legislative body in the world; this article of the constitution has been peculiarly confided to them, and they have acted upon it under the obligations of an oath. If I shew, by a great many acts of congress, that they have believed, ever since the adoption of the constitution, that the term *tonnage duty*, meant just such a duty as that before the court, and that such a duty could not be imposed but by the consent of congress, expressed by an act of congress, and that a great part of the states, particularly those in which the constitution of the united states has been most studied, and best understood, have entertained the same opinion; I think this court cannot fail to give to the article of the constitution under consideration, the same construction.

An act of congress, approved the 26th of April, 1816, declares "the assent of congress to an act of the general assembly of Virginia, entitled, an act to incorporate a company for

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the purpose of improving the navigation of James river, from Warwick to Rocket's landing, passed the 22d of February of the same year." An act of congress, of the 11th of August, 1790 (the year after the adoption of our constitution) declares their consent to the acts of several states, levying duties on the tonnage of ships or vessels. Among others, to an act of the state of Rhode island, entitled, "an act to incorporate certain persons, by the name of the River Machine Company, in the town of Providence, and for other purposes therein mentioned," and an act of the state of Georgia, "for laying and appropriating a duty on tonnage, for the purpose of clearing the river Savannah, and removing the wrecks, and other obstructions therein." An act of congress, approved the 27th of March, 1798, grants the consent of congress to an act of the commonwealth of Massachusetts, entitled, "an act to incorporate Tobias Lord and others, for the purpose of keeping in repair, a pier at the mouth of Kennebunk river, and to grant them a duty to reimburse the expence of erecting the same." The act of 1799, concerning quarantine and health laws, contains this proviso, "that nothing

herein, shall enable any state to collect a duty of tonnage or impost without the consent of the congress of the united states thereto." An act of congress, of the 28th of February, 1806, declares, " the consent of congress to an act of the legislature of Pennsylvania, so far as to enable the said state to collect a duty of four cents per ton, on all vessels which shall clear out from the port of Philadelphia, for any foreign port or place whatever, to be expended in building piers in and otherwise improving the navigation of the river Delaware, agreeably to the intentions of said act." For the foregoing acts of congress, I refer the court to *Acts of Congress*, 1816, *p.* 77, *vol.* 2, *Dig. Laws of United States*, 181, *Vol.* 3, *ditto*, 35, 126, 7. *Vol.* 4, *ditto*, 8. And for similar acts to *vol.* 2, *Dig. Laws of United States*, 439, 191, 2, 258, 533. *Vol.* 3, *ditto*, 319, 474, 586, 423, 641. *Vol.* 4, *ditto*, 686, 10, 165, 235, 348, 524; and *Acts*, 1816, *p.* 133.

If congress had not believed their consent necessary in these cases, they would not have granted it; if the states had not deemed it essential, they would not have petitioned for it. Such is the construction which Washington, Adams, Jefferson, Madison, and the great and

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good men associated with them in the government of the nation have, under oath, given to this clause in the constitution. It is too late for the defendants to expect a different construction from this enlightened tribunal.

But the company in their answer, plead several acts of congress, one of the 3d of July, 1807; another of the 18th of April, 1814; and another of the 16th of April, 1816, which they suppose supply the consent of congress required by the constitution. These acts grant certain lots of land to the Orleans Navigation Company, and nothing more. There is still another act which appropriates $25,000, to assist in completing the canal from the basin to the river. It has been argued with irresistable force, that these acts give no validity to the charter of the company, which it did not possess before. See *General Ripley's argument*, 7 *Martin*, 599, 600. But be that as it may, these acts surely do not affect the position I have taken. My position is, that the tonnage duty imposed in favour of the company, on vessels entering the bayou St. John, has never been consented to by congress, and therefore, that the exaction of it violates the constitution of the united states. It is answered, that

congress have given their consent to said tonnage duty, because they have given the Orleans Navigation Company land, and offered them money. The conclusion does not follow from the premises. The Orleans Navigation Company may be constitutionally organized, and possess a great many constitutional powers. But one power which it claims (that of exacting a duty from vessels entering the bayou St. John, a navigable water, belonging to the united states) is, without the consent of congress, unconstitutional and void. Still in the exercise of its constitutional powers, it commands the interests and the affections of the government. It purports to be a company "for improving the inland navigation of the territory." The great improvement in contemplation, is the connection of the lakes with the river by a canal. This is an object of immense public importance for the defence and commerce of the country. To effect it, congress granted to the company the land on which the canal is to be constructed, other lots, and offer them money. What is the effect of these grants? Merely, one would think, that the company had obtained from congress, gratuitously, a

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valuable strip of land, in the rear of, and running through this city. This little grant was the whole subject matter before congress. Not a member in that body imagined that he was legislating upon any other subject than a small strip of public land, which it was represented, might be converted to public utility. But no, say the Navigation Company, we have circumvented congress. They thought they were granting us from their immense territories, a bagatelle of land, a mite from their treasury, because that was all we asked. But they have granted us what we did not petition for. By these acts, they have granted us, although they did not know it, their all important consent to the interminable exaction by us, of a high duty of tonnage on the vessels of a large portion of their fellow-citizens, sailing on a navigable water of the united states. Such are the preposterous pretentions and arguments by which the company support their right to an oppressive and ceaseless extortion. In those acts which I have cited to the court, in which congress have expressly given their consent to tonnage duties imposed by the states, they have cautiously limited the existence of their as-

sent to short periods; but here it is pretended, that by mere implication they have given it illimitably.

Congress, therefore, have neither expressly nor impliedly given their consent to the imposition and exaction of the duty of tonnage in question. But they have not been silent on the subject, they have prohibited its existence by two acts of congress, before its imposition, and three since. By an act of congress, of the 27th of March, 1804, about a year before the imposition of the tonnage duty in question, on vessels navigating a navigable water within the territory of the united states, south of the state of Tennessee; it was declared, " that all navigable rivers within the territory of the united states, south of the state of Tennessee, shall be deemed to be, and remain public highways." *Ingersol's Dig.* 505. By another act of congress, passed the 2d of March, 1805, and which must have been published in Louisiana, just about the time the governor and his " thirteen discreet inhabitants" were in divan, to impose the duty in question, (July 5th, 1805) it was declared, " that the inhabitants of the Orleans territory, shall be entitled to, and enjoy all

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the rights, privileges, and advantages secured by the ordinance for the government of the territory of the united states, north-west of the river Ohio." 1 *Martin*, 170. What were those rights, privileges, and advantages? That "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same," (that is, as applied to another territory, navigable waters generally) "shall be common highways, and forever free, as well to the inbabitants of the said territory, as to the citizens of the united states, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 *Martin*, 196. Congress thus sufficiently manifested their dissent from the imposition of the duty in question, by prohibiting it in anticipation; and the continuance of that dissent, must be presumed, until their express consent be given.

And I derive from the latter act of congress, a conclusive argument against the duty. It was the supreme law of the land, exempting the use of the bayou St. John from duty. But, the governor and legislative council of the territory, imposed the tonnage duty in question, on that use, in direct viola-

tion of the restriction of their powers, to pass no act "inconsistent with the constitution and laws of the united states."

Congress so far from giving their assent to this duty, have, since its imposition, passed *three acts* inconsistent with its exaction. By an act of the 10th of March, 1812, it is declared, that "all navigable rivers and waters, in the territories of Orleans and Louisiana, shall be, and forever remain, public highways." *Ing. Dig.* 523. By an act of the 20th of February, 1811, to enable people of the territory of Orleans, to form a constitution and state government, it is declared "that the river Mississippi, and the navigable rivers and waters leading into the same, or into the the gulph of Mexico, shall be common highways, and forever free, as well to the inhabitants of said state, as to other citizens of the united states, without any tax, duty, or toll therefor, imposed by the said state." *Dig. L. U. States vol.* 4, 329. By the act for the admission of Louisiana into the union, it is declared, "that it shall be taken as a condition, upon which, the said state is incorporated in the union, that the river Mississippi, and the navigable rivers and waters leading into the

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same, and into the gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to the inhabitants of other states, and the territories of the united states, without any tax, duty, impost, or toll therefor, imposed by the said state, and that the above conditions shall be considered, deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the union." *Dig. L. U. States, vol.* 4, 402.

From the latter act, I derive, of all others, the most serious argument against the exaction of the tonnage duty in question. By it congress have declared (and our state, by its incorporation in the union, have agreed to the declaration) that they have never relinquished the sovereignty of the bayou St. John, nor consented to any duty of tonnage imposed on vessels using it; and that Louisiana is a state, only on the fundamental condition, that the said navigable water shall forever remain free to every body, without any duty imposed by the said state. If the duty in question, had been constitutionally imposed, if the charter of the company were perfectly unobjectionable, if no one could have said a word

against either, under the territorial government, this compact between congress and the state, and the people of Louisiana, put an end to that charter, so far as it imposed that duty. In doing this, congress, our state and people, may have acted with great injustice to the late territory of Orleans, and the Navigation Company incorporated by it. But the act is done, and cannot now be revoked. We cannot give up our state sovereignty, and we hold it only on condition that no person shall pay for using the bayou St. John. Those who are injured, can only petition our legislature and congress, for redress. This court holds its authority under the constitution and laws of the state of Louisiana; and has sworn to support them, and the constitution and laws of the united states. It is a fundamental law of the relation existing between these two powers, that the navigable water, called the bayou St. John, shall be free to the citizens of the united states, and of this state, without any tax, duty, impost, or toll. One of those powers, the state, under which you hold authority, now calls upon you to protect the citizens of this state, and all others, in the rights guaranteed to them by that

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fundamental law. You must do it by the sacred solemnity of an oath.

This is the true exposition of our relation with the united states. Now for the quibbles of the company. It will be said, the compact guaranteed the citizens against a duty imposed by the *state*, but the duty of tonnage in question, was imposed by a *territory*. The answers are numerous; I will trouble the court with but one. I answer, that no laws exist in this state, but by authority of the state; none can be carried into effect but by officers appointed by the state. The territory of Orleans, its authority and laws, expired with the formation of our constitution. By a clause in that constitution, all laws in force in the territory, not inconsistent with the constitution, were retained in full effect. *sec.* 4, *Sched. Const.* If the duty exists, it was revived by this clause, and was therefore imposed by *the state*, not the *territory*. By this clause most of the laws of the territory were re-enacted, and put in force throughout the state of Louisiana. Some were not re-enacted but expired. Among these, was that part of the act organizing the Navigation Company, which imposed a duty on persons naviga-

ting the bayou St. John, at this period certainly a navigable stream. Because the act of congress, for the purpose of enabling us to form a constitution and state government, had required, as the basis of our constitution and state government, that the bayou should be a common highway, and forever free to the citizens of the united states, and others, without any tax, duty, impost, or toll therefor imposed by the state. Now the constitution, formed on this basis, could not revive and re-enact a law, exactly repugnant to it, a law imposing the duty prohibited.

But again, the act of congress speaks of navigable waters "*leading* to the gulph of Mexico." An able advocate of the company, maintained strenuously (because he had no other resource) that the bayou St. John did not *lead into* lake Ponchartrain; but on the contrary, *made from it*, and of course, run up the Mississippi, to the place where we have ordinarily supposed it headed, (see the argument, 7 *Martin*, 623.) This almost equalled the imagination of a Virginia poet, who among other flights of fancy, sung:—

"*Up Shockoe hill the ships of burthen steer.*"

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But even this resource did not meet the law; for as a road may lead up or down hill, to a given place, so the bayou St. John, whether it run up stream or down, might lead its navigator to the gulf of Mexico. The same advocate was not more at a loss here. The bayou St. John leads to lake Ponchartrain, the lake to the Rigolets, and the Rigolets to the gulf of Mexico; and therefore he is entitled to fifty per cent. per annum, on his capital, out of the pockets of poor people. *Quod erat demonstrandum.*

It has been suggested by the court, that if the Navigation Company acquired the right to exact the tonnage duty in question, they were protected in the enjoyment of that right, even against the power of congress, by the third article of our treaty with France, and which is sanctioned by the fourth and fifth articles of the amendments of our constitution. The treaty provides, that the inhabitants of the ceded territory shall be protected in the free enjoyment of their property, and those articles of our constitution generally, that the people shall be secure in their property, and that the same "shall not be taken for public use without just compensa-

tion." We are not claiming the vested property of the company. Let them keep that, and use it in the exercise of their constitutional powers. We are contesting their right to demand property, or which is the same thing, money from us. They pretend congress have granted them a right to demand a tonnage duty from us. If congress have, it is a right granted upon the intrinsic condition, that congress has the great power of rescinding it when they may think the public good requires it. "A corporation legally established, may be dissolved by an act of the legislature, if they deem it necessary or convenient to the public interest, in all cases in which the existence of said corporation is not warranted by treaties." *Civil Code*, 92, *art.* 22. This provision of the *Code* was but the ancient law of the land, and the exception in favor of corporations guaranteed by treaties, is not applicable to the corporation before the court, inasmuch as their charter was granted subsequently to the treaty mentioned. Even if a state be restrained by the constitution of the united states from dissolving a charter, congress are not. *Con. U. S. art.* 1, *sec.* 10, *n.* 1. The parliament of Great Bri-

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tain possessed this power. 4 *Wheaton's Rep.* 643. They rescinded the charter of the East India Company. The measure was advocated by Burke, Fox and Sheridan; by the talents of that nation, and opposed by its wealth, which finally prevailed. Congress are as omnipotent here, with regard to subjects confided to them, as parliament in Great Britain. The company, therefore, possessed the right of demanding the toll in question, upon this legal condition, that it was defeasable at the will of congress. If the permission to demand the duty has ever been given, by the act admitting us into the union, it has been taken away. The permission to demand the tonnage duty in question, cannot, therefore, be considered property to which the treaty and amendments to the constitution are applicable. If it be so regarded, the argument is a two-edged sword; it cuts more in our favor than against us. If the right to demand a duty of those navigating the bayou, is such property as might be protected by the treaty and constitution, the pre-existing right of the inhabitants of the ceded territory, and the citizens of the united states, to navigate the bayou free of toll, was equally a property

which the treaty and constitution sanctified to them. The grant to the company of the right to demand toll from them for that navigation, was an invasion of that property, by taking it entirely from them. The toll is imposed on vessels of one ton burthen and less. The evidence shews, that the improvement of the bayou could be of no value to them, and even to much larger vessels. The property of the owners of them, therefore, has been "taken for public use, without just compensation."

The governor and legislative council of the territory of Orleans, were expressly prohibited by the act of congress, creating them, from "the primary disposal of the soil of the united states." The soil on which the canal Carondelet has been dug, from the bayou to the basin, belonged to the united states at the time the Navigation Company was organized. Several of the witnesses prove, that it was dug by the baron Carondelet, for a public highway. "The soil of a highway is public property." *Renthorp* vs. *Bourg*. 4 *Martin*, 97. The soil of the canal, therefore, belonged to the king of Spain, and the united states, as his successors, have only to establish his title, in order to shew title in themselves, un-

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til a grant from them is produced. See *Moreau & Carleton's translation, Part.* 1*st vol.* 183. And also 4*th vol. Dig. L. U. S.* 112, 361. The company shew no grant from the united states, because they have none. They claim the soil of the canal, under their act of incorporation. But the governor and legislative council had no right to grant that soil to them. In doing so, they transcended their powers, and the grant is void. Indeed, if the governor and legislative council could have disposed of the soil of the united states, the company have not acquired a title to it in the mode pointed out by the legislature in the 7th section of their charter.

But the company contend, that the act under which they claim, was reported to congress, and was not disapproved. On the contrary, congress granted them other lots of land; their title to the soil in question is therefore clear. I answer, that congress sufficiently disapproved the act, by expressly prohibiting it. The reasoning of the company familiarly illustrated, would be laughed at. My neighbour grants Tom Stiles five hundred acres of land, which belong to me. I did not authorise him: on the contrary, I expressly

prohibited him from doing so, in the presence of Stiles. The grant is, however, reported to me; I say nothing: on the contrary, I afterwards give Stiles one hundred acres of land. What is the consequence? One would think simply, that Stiles was the proprietor of one hundred acres of land. O no, says Stiles, you knew what your neighbour did, you kept silence; nay, you afterwards gave me one hundred acres; you have therefore clearly given me also the five hundred acres. *Quid rides*, (I might say to any one of the company, for there is not one of them that would not laugh at such logic.)

Quid rides? mutato nomine, de te Fabula narratur.

It is then clear, that the soil on which the canal is dug remained in the united states. If the title were now litigated, between a grantee of the united states and the company, (and this is the test) there is not a judge in the world but would decide in favor of the grantee. The lands of the united states are conveyed by grants, in pursuance of acts of congress, expressly authorising them. The one party could shew a grant, the other could not. The canal Carondelet then, still be-

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longs to the united states. The consequence is necessary, that all the citizens of the united states have a right of way through the canal, free of duty; because all the citizens of the united states have a free and common right of passage over the water, and unappropriated soil of the united states. No person has a right to hinder or incumber their passage, but by authority of congress. Congress have granted no such authority; on the contrary, they have prohibited the private appropriation of the public land and water, by many acts of congress.

But the company mantain, that the state has no right to question their title to the property, on the ground that it belongs to the united states. They are mistaken, we have this right. *The 3d law, 32d title, 3d Partidas*, declares, that any individual may forbid another from erecting new works on public places: *Para si començando algun ome a labrar algun edificio de nuevo en la plaça o en la calle o exido comunal de algun lugar, sin ortogamiento del Rey o del concejo en cuyo suelo lo fiziesse, estonce cado uno de aquel pueblo le puede vedar, que dexe de labrar en aquella labor.* The 9th law prescribes the proceedings before the judge, in

case he that is forbidden does not desist. The plaintiff, to succeed, must shew that the place is public, the defendant, that it is private. The plaintiff therefore, contests the defendant's title, on the ground that the title is in the public, the very case before the court. Now, if we may contest the right to erect the new works, to construct the canal, on the ground that the place is public, it is very clear, that we may, on the same ground, contest their right to demand toll of us, in consequence of the construction of those works. This is plain reason. We all have a right of passage over the land of the united states, while it remains public. If any one impede that right, may we not ask, have you a grant, is it private property, and no longer public? If I am charged to pay you twenty pounds when you are of age, if the money is demanded, may I not ask are you twenty-one?

The canal Carondelet is therefore a public highway of the united states, because it is proved by the witnesses, to have been a public highway of the king of Spain. It has never been legally alienated as to its substance or use. It is therefore free for the use of all the citizens of the united states, without any

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toll. The state demands of this court to protect her citizens in the enjoyment of this use.

If the charter of the company was rightfully granted, we contend, on behalf of the state, that it has been forfeited by the nonfeasance of the company, in not completing the navigation from the bayou St. John to the Mississippi river. "A community or corporation, legally established, may be dissolved by the forfeiture of their charter, when the community or corporation abuses their privileges, or refuse to accomplish the conditions on which such privileges were granted, in which case, the corporation becomes null and void by the effect of the violation of the conditions of the act of incorporation. *Civ. Code*, 92, *art.* 22. An attentive perusal of the 9th section of the act organizing the company, will convince any person that it was the intention of the government, in granting the charter, to have the navigation completed from the bayou to the Mississippi. The canal from the bayou St. John to the river, is the only canal specially pointed out by the legislature. All other improvements, were, by the terms of the charter, left to the discretion of the company. It was optional with them to make the im-

provements or not, and the emoluments to be received were conditional. But with regard to this canal, the legislature declared, not *if*, but *when* the company shall have made such and such parts; and finally, "*when* the communication between the said navigation and the river Mississippi *shall be made complete*," they shall be entitled to proportional tolls. The legislature, therefore intended, that the work should be made complete, and the company, by accepting the charter, acceded to that intention.

The completion of the work by the company, was therefore a matter of compact between the parties. The government has an immense interest in the completion of the navigation. If it had been complete at the time of the late invasion, our gun-boats might have been saved, and the British army destroyed. The state has strictly a pecuniary interest. If the navigation were complete, the revenue from it would be greatly enhanced. The surplus, beyond fifty per cent. on the capital stock of the company, is reserved to the state. There is a compact then, that the work shall be completed by the company, and the government, who have granted immu-

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nities to the company, on this condition, are and were, interested to the last degree, that it should be completed with the least possible delay. What time then shall be allowed for its completion, in as much as none has been specified in the contract? In the most ordinary contract, without a limitation, as to the time for performance, a reasonable time must be allowed, because that is the presumed intention of the parties. The same rule must be applied to the present case. If then, we shew that the company have had the means, since the year 1816, of finishing the work from the basin to the river, and have not yet commenced it, surely the court will think it now time that the state should receive back those powers and privileges, which were granted only in consideration of the advantages she expected from the completion of the work.

In 1816, the canal was completed to the basin. The company were not in debt, as their books, before the court, shew. They then commenced receiving tolls on vessels arriving at the basin, which have yielded them large dividends ever since. Those tolls alone, would have enabled them to commence the canal from the basin to the river.

But that same year they sold lots, as the evidence shews, to the amount of $98,000; besides which, congress had appropriated $25,000 for the particular purpose of completing the canal. With these sums, they might before this time, have finished the canal, and yet, regardless of the spirit of their contract, of the interest of the united states, and of the state who have granted them a charter foolishly liberal, thoughtful only of their own pockets, they have not yet commenced the canal, which should have been finished. If ever a contract was annulled on the demand of one party, for non-performance by the other, the state is entitled to that relief, with regard to the contract before the court.

It will be urged, that the charter of the company has been acquiesced in seventeen years, by those who were interested to oppose it; that the national and state legislatures have passed many acts respecting it; that it has prosecuted and defended suits in our courts, without the constitutionality of its powers being questioned; that opposition to its powers, has not been made until the company have expended large sums of money for the public benefit, which it will loose if it be successful.

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From these sources, an argument will be derived in favor of the powers of the company *communis error facit jus*, it will be said, and the case of *Rodgers* vs. *Beiller*. 3 *Martin's Rep.* 371, *Stewart* vs. *Laird*, 1 *Cranch*, 309, and *M'Cullough* vs. *the Bank of Maryland*, will be cited in support of the argument. It is an argument which has weight, and requires refutation, and the circumstances on which it is founded, explanation.

The people peculiarly interested to oppose the impositions of the company, have but very lately obtained a voice in our legislature. In 1812, they were annexed to the state. The war continued until 1815, during which time they brought but little cotton to market, because it was valueless. Since that period their complaints have been incessant and loud. And since the year 1816, when the sufferers brought their first crop to market, and began to complain, I recollect no act of congress, nor of the state legislature, respecting the company, but that before the court, which calls them to account. They have since appeared in two suits only, the one with *Delacroix*, in which they were compelled by this court to do that justice which they

refused, and to which every private company would have been compelled, and the suit with the schooner *Amelia*, in which their pretention to demand toll from her, was successfully resisted, and the constitutionality of the demand seriously questioned. The acts of congress, and of the state legislature, in favor of the company, previously to that period, were passed, because no person was interested to oppose them. If those who are substantially my clients on this occasion, had had that interest, they had no voice in the national or state legislature. In passing those acts, therefore, in favor of the company, the eagle eye of interest did not examine the detail of the charter. It imported to be a charter for the improvement of internal navigation. That was an object worthy of favor, and received it abundantly. But it was not particularly observed, that it was to be partially effected by the imposition of an unconstitutional duty.

The maxim on which this argument is founded, *communis error facit jus*, cannot be law in the sense in which it is applied. It is true, long usage on indifferent subjects, may grow into law, but error is always error, and a great

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deal of error may do a great deal of wrong, but can never make right. That the company have exacted money, without the authority of law, seventeen years past, is no reason why they should continue to exact it seventeen years to come. They have exacted a tax seventeen years without law, because the voice of the poor they have oppressed, has not, until now, been heard by the drowsy justice of the country. It is time that justice should sleep no longer.

The alarm of the defendants, lest they should be ruined by the loss of the capital they have expended for the public good, is more sounded than felt. The great and generous state of Louisiana, has never suffered the services of a single individual to pass unrewarded. She will never. In the exercise of her generosity, she is prosecuting this suit for the protection of her weak citizens against the extortions of the strong. If the latter have "done the state some service," they may rely with unbounded confidence, on the same generosity, for ample remuneration.

Workman, for the defendants. This suit is brought in pursuance of a resolution of the general assembly, requiring the attorney-general, to issue out of the first district court, a *scire facias*, to ascertain—first; the constitutional validity of the charter of the Orleans Navigation Company; and secondly, whether the same, if constitutional, be not forfeited by reason of the nonfeasance and malfeasance, the illegal and oppressive actings and doings of the company.

This is a prosecution then, instituted at the command of the highest deputed authority in this commonwealth. It is entitled, therefore, to the most respectful, the most patient, the most solemn investigation. If the high party, plaintiff in the suit, had confined himself to directing an enquiry into the constitutional validity of the charter of my clients, I should have proceeded at once to the question at issue, without permitting myself to make any remarks on the motives or causes in which the suit had originated. But when this powerful prosecutor, not only orders, but undertakes to decide on the merits of the prosecution; when he adds to the weight of his authority, all the force of his reasoning powers

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and his eloquence, we must be permitted, in our own defence, to examine freely the principles and arguments which he is pleased to employ, not to judge but to pre-judge our cause. For he does not, as the court will presently see, resolve that we shall be tried, until he has previously, and very positively proclaimed, that we ought to be condemned. This mode of proceeding, though extraordinary, is not original. It was used by the British parliament in 1794, when they declared, by resolutions of both houses, that certain persons, whom the government intended to try as traitors, were really guilty of treason. A British jury defeated the mistaken zeal of their parliament; and the judiciary of Louisiana will, I trust, with equal freedom and firmness, resist the erroneous doctrines and declarations of her legislature. There is another precedent for this practice, of much higher antiquity, though perhaps not quite so authentic. The reporter is Virgil, who tells us in language much better than we find in the writings of our lawyers, or even in those of our legislators, that one of the rulers of the infernal regions, first condemns and punishes

the accused, and afterwards grants them a hearing:—

Gnossius hæc Rhadamanthus habet durissima regna,
Castigatque auditque dolos.——

The character of my clients, as well as their interest, requires me to examine the legislative declarations in question. Lord Coke, indeed, assures us, that a corporation cannot be excommunicated, because it hath no soul; but though it cannot be damned in the next world, it may, by calumny, be rendered odious and infamous in this.

The resolutions, in obedience to which this suit has been brought, have the following preamble:—

1. "Whereas, doubts are entertained of the constitutional validity and obligation of a certain charter granted by the governor and council, to the Orleans Navigation Company, by an act, bearing date the 3d day of July, 1805;

2. "And whereas, numerous complaints of repeated violations of said charter, by said company, have, from time to time, been made by the good people of Louisiana, and others navigating the waters of lake Ponchartrain;

3. "And whereas, highly favoured mono-

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polies and exclusive privileges are, in their nature, adverse to and incompatible with, the genius and spirit of a free people; tending, manifestly, in their oppressive operations, to the alienation of the affections of the citizens for their government; and whereas, it is expedient, and at all times desirable, that the people should distinctly understand their rights, as well as the nature and interest of corporate institutions, existing under the colour of legal authority."—

And then, the legislature proceed to authorise and require the attorney-general to issue out a *scire facias*, to ascertain the points stated at the opening of my argument.

As to the doubts mentioned in the first paragraph of the preamble, it is greatly to be regretted, that they did not occur to the legislature, nor to any of its enlightened members, nor to any of the persons interested in the navigation of the lakes and the bayou St. John, until sixteen years after our charter had been granted, and a sum of $375,000, had been expended by us, in rendering that bayou, and the canal of Carondelet navigable: no such doubts ever occurred to the former legislatures of this state, by whom some acts

in our favour were passed, nor to the congress of the united states, who have passed many acts recognising our institution, and even granting us their assistance; nor to our judiciary, by which several suits, for as well as against this corporation, have been decided. The supposed complainants, it is pretended, were unrepresented for many years in our legislature, and therefore could not make their hard case known. This apology will not avail them; for any person whatever might have contested the validity of our charter, whenever he might be sued, or his property seized, to pay the required tolls.

With respect to the numerous complaints of the violation of our charter, declared by the second paragraph of the preamble, to have been made against us, the record before this court, not only does not contain one word to justify, excuse or extenuate this part of the preamble, but it does contain full and unquestionable evidence, to prove that if any such complaints were ever made, they must have been unfounded. Notwithstanding all the zeal and diligence of the counsel by whom this prosecution has been so ably conducted, they could not produce a single witness to

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accuse us of any malfeasance, of any one illegal or oppressive act. What can have become of all "the good people of Louisiana, and others navigating the lake Ponchartrain," by whom these numerous complaints against us have from time to time been made? Have they all concealed themselves in disguise, like the army of Prince Prettyman, in the rehearsal; or melted into thin air, like Prospero's spirits; or vanished all at once like the Wierd sisters on the blasted heath? Not one to be found to state his grievances against us; not one to support this strong and harsh assertion of his representatives!—On the contrary, it is shewn on this record, by irrefragable testimony, that far from abusing our privileges, we have exercised them with almost unprecedented disinterestedness and moderation; that we have never demanded much more than *one half* the amount of the tolls we were entitled to exact, even though our capital, actually paid down in cash and expended, was for many years altogether unproductive; and even now, has yielded on the whole, but little more than at the rate of five per cent. per annum; a dividend not half what is usually given by our

banking and insurance companies; and that the whole of the tolls, on a cargo of cotton, from fort St. John to the basin, would not amount to the one-third of one per cent. on the value of such a cargo, at the present prices.

All this will appear manifest on a view of the evidence produced by us at the trial of the cause in the court below. Paul Lanusse swears, that he knows that the whole stock of the company has been paid up, and also that the whole of the tolls received by the company, and their capital, has been expended on the amelioration of the navigation of the canal and bayou, and the proprietors of the stock remained some years without receiving a single cent of dividend on their shares.

Louis Blanc swears, that he knows that until the navigation company removed the obstructions at the mouth of the bayou, that in the winter as well as the spring, vessels frequently, when loaded with pitch and tar, and with cattle, were obliged to throw their cargoes over-board; that in 1804 and 1805, vessels of 20 tons could scarcely get in to the bayou bridge; and that since the establish-

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ment of the company, he has seen three brigs, of 150 tons each, at the same place.

Louis Alard swears, that in the year 1800, the navigation of the bayou and the canal were much obstructed by sand bars, chicots, and various other impediments; that he has know a schooner to remain for three weeks aground on the sand bar, which was opposite to Marigny's canal; and has often seen other vessels aground on the other bars; that as to the bar at the mouth of the bayou, he has seen it often with very little water on it, and recollects a chalan belonging to his father, which was at that period employed in carrying shells, remaining eight days abandoned on the bar outside, aground, for want of water, although this chalan drew only from a foot to fourteen inches water; that in ordinary times of low water, there was about two feet to two feet and a half water on this bar; that the inhabitants on the other side of the lake learned from practice, to discover when the water was high or low on this bar, and sometimes remained a month at home, waiting for a rise of water on it; that when the water was very low, he has known a hunter's pirogue touch going over this bar; that a number of chalans

were then kept at fort St. John, for the purpose of unloading vessels, to enable them to cross this bar; that the expence (when every thing was cheaper than at present) for unloading a vessel of 20 tons, and putting the cargo into the chalans, to enable the vessel to cross the bar, would have been about $30, if the vessel was loaded with tar or pitch, or other articles of easy transport; that besides the inconvenience of unloading the vessels at the bar, the chalans were compelled on account of the several other bars inside, to take their loading up as far as the bayou bridge, by which means the cargoes of the vessels were often damaged in bad weather; that at the time of his arrival in this country from France, the canal Carondelet, although very recently finished, was even then so obstructed, that only very few of the smallest sort of vessels entered it, for fear of being left by the fall of the water, and not being able to get out; that at the time of the cession of this country to the united states, this canal was so much abandoned, that even in high water the number of vessels which entered it was so small, as hardly to be worth mentioning; that in general, the obstructions of the navigation

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of the bayou were so numerous and so great, that he is convinced that at the above period the persons having occasion to transport goods or produce on it, would willingly have paid double the duties which are now exacted by the navigation company, to have the advantages which are enjoyed at present; that the whole of the trees which obstructed the navigation of the bayou, have been cleared out, except one or two, which, in very low water, still embarrass the navigation; that at present vessels of 40 to 45 tons, pass without any obstacle at low as well as at high water; that vessels of 150 tons have lately entered the bayou; that vessels of from 40 to 60 tons, from Pensacola, Havana, and from the different northern states, now arrive at the basin of the canal Carondelet; and that in the years 1811 and 1812, the navigation of the bayou St. John, was so much improved by the company, that chalans were no longer employed to unload vessels on entering or going out.

This testimony of Alard, is corroborated in every important particular, by that of Guillaume Benite. He swears, that there is as much difference between the present and the former state of the navigation of the bayou.

and of the canal, as between day and night; that at present he knows a vessel carrying 550 barrels, that enters the bayou without touching, and goes out also; and that formerly a vessel of any tolerable size, loaded with lime, could not approach the bar at the mouth of the bayou, without considerable danger.

Judge Pitot, who has been acquainted with the navigation in question for about twenty-five years past, testifies to the same effect as the preceding witnesses. He states, that he came to this country from Pensacola, by the way of the bayou St. John, in a small vessel of 18 tons; that on his arrival at the bayou, he was informed by the captain that he must pass the night there, unless he would go up to the bridge in a pirogue, which he did, and left the vessel out side; that at this time there was not more than ten or twelve inches water on the bar; that in the year 1796, there were two or three small schooners in the basin of the canal Carondelet, but it was so filled up that they remained there two or three years before they could get out; that the navigation of the canal had entirely ceased, except in extraordinary high water; that

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as to the bayou, at the time of the establishment of the company, he knows, that besides the sand bars in the inside of the bayou, there were ten or twelve places where it was impossible to pass, except in high water, from the logs which obstructed the bayou; that vessels which formerly made one voyage a month, after the establishment of the company, made four voyages a month; that the canal Carondelet was dug by order of the baron Carondelet, for the public use, and no toll was paid by vessels entering it; that this canal was entirely useless two years after it was dug, and was almost filled up, witness having crossed it often when dry.

Joseph Rabassa confirms every thing already stated respecting the former, and the present state of the navigation of the bayou St. John, with which he has been well acquainted for twenty-three years past. He also swears, that at the time of the cession of this country to the united states, or about a year and a half after, the basin of the canal Carondelet was almost filled up, and also the canal itself, as far as the half moon; that when the roads are good, it would cost about ten dollars for cartage, to load a vessel of 20 tons burthen,

at the bayou bridge; (that is, as I understand it, to cart the cargo from this city to that bridge) that since the improvements made by the navigation company, the bayou is navigable for vessels drawing six feet water; and on the bar outside, there is always three feet and a half water, at the lowest water; that vessels drawing three feet water come up to the basin of the canal; and in high water, vessels drawing five feet, enter the canal; that vessels of the burthen of from 50 to 70 tons, trade to the bayou and basin from Havana, Pensacola, and the northern states; that there may be upwards of one hundred vessels employed in the trade on the bayou and the basin; that he knows that the improvements he describes in the navigation of the bayou and canal, are entirely owing to the works of the navigation company; that he has worked at these himself, and that when employed in depening the bar at the mouth of the bayou, and had got eight feet water on it, next day, by a strong north west wind, it would be diminished to three feet; and that previous to the cession of the country, the sail rigged vessels which anchored at the bayou St. John, might be from 20 to 30 in number.

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J. H. Holland, the deputy-sheriff, swears, that he has been well acquainted with the navigation of the bayou and canal Carondelet since the year 1802; that he is satisfied, from the state in which the bayou and canal are now, compared with what they were formerly, that it would cost more to navigate them formerly, (that is to say, before the improvements made by the navigation company) than it would do at present, paying the tolls of the company; and this, besides the risk of lives. That he was once in a small vessel of only three or four tons, which grounded on the bar outside, and was shipwrecked, and one of the hands perished; that the charge of a load from the city to the bayou bridge, was generally from $1 25 cents to $1 50 cents; and in bad weather, they would charge a dollar for a single barrel; that vessels were sometimes detained a considerable time at the bridge, waiting for a cargo, on account of the badness of the roads. In all other respects J. Holland corroborates the testimony adduced on the part of the defendants, as I have already briefly and substantially set it forth.

Here we have made out a case of the most

liberal, disinterested and meritorious fulfilment of our duties to the public, even to our own great detriment; a case which has not, perhaps many precedents in this or any other country. We have removed all the bars and sand-banks, and cleared away all the obstructions to the navigation of the bayou St. John; we have dug a noble canal, in the place of the almost dry ditch, formerly miscalled the canal Carondelet, and scooped the deep and spacious basin, now crowded with the well-freighted vessels of various nations; we have added, at least, fifty per cent, on an average, to the value of a large portion of the real property of this city. And after having, in order the more speedily and completely to accomplish all those great objects of our institution, expended not only the whole of our capital, but even the whole of the tolls received by us for several years, and which might have been justly divided among the stock-holders;—After having, I say, been for so long a period without receiving one cent of dividend on our capital of $200,000; then, instead of indemnifying ourselves, which we might fairly have done, for the losses occasioned by our long self-denying ordinance, by

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requiring the full tolls to which we were entitled, we contented, and do still content ourselves, with but a little more than one half that amount. We demand only one dollar and a quarter, instead of the two dollars per ton, which we are authorised to exact on vessels navigating from the mouth of the bayou to the basin in the city. Small craft pay but fifty cents per ton; while all ordinary fishing-boats are wholly exempted from toll.

All these facts and circumstances are now, and always have been matters of notoriety, particularly to the legislature, who annually appointed a committee of their members to enquire into our conduct and concerns. What then shall we say of those, who, without a shadow of evidence, or ground of suspicion, denounce us for malfeasance, for illegal and oppressive actings and doings, for repeated violations of our charter?—Of those, who having founded on their will, a judgment of condemnation against us, have recourse to their imagination for the facts requisite to support it? Let us be permitted to compare them, in one respect, at least, with that illustrious Grecian ruler, whom the poet characterises—

Fandi fictor Ulysses.

Though the counsel for the prosecution did not allege in their petition, any specific act of malfeasance against us, yet we gave them full liberty to offer to the court any species of evidence they could obtain, in support of any act of that kind which they might be able to discover. They did not attempt, because they could not fairly attempt, to fix any such act upon us. And when their zeal, talents and industry are considered, this circumstance amounts to a decisive proof of our innocence. Far from laying to our charge any illegal or oppressive doings, the learned gentlemen seem so well satisfied with what we have already done, that they only complain of us for not having done more; for not having continued our useful and excellent works, so as to connect the canal Carondelet with the river Mississippi.

The third paragraph of the preamble to these resolutions, assails us with all the force of metaphisico-economical philosophism, and populace-courting rhetoric. (I will not pervert or degrade the glorious epithet, *popular*, by applying it to the common place rhapsody of which I am about to speak.)—We are assured in the first place, that highly

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favoured monopolies and exclusive privileges are in their nature adverse to, and incompatible with the genius and spirit of a free people. Now, as the privilege conferred upon us, of taking tolls to indemnify us for our expences, is necessarily an *exclusive* privilege, it follows of course, that it ought to be abolished: inasmuch as nothing which is in its nature adverse to the genius and spirit of a free people, should be suffered to exist in a free country. And thus a capital of $200,000 is forfeited, and many worthy families reduced to beggary by a syllogism.

It is extraordinary to hear such a condemnation of exclusive privileges, pronounced by a legislature, who have themselves granted many and important exclusive privileges, to enable several persons to establish ferries, build bridges, improve the inland navigation of the state, or effect other objects of public utility. I have counted no fewer than twelve of their acts (all passed in the same sessions that produced the resolutions against our unfortunate company) for granting privileges of this kind. And on examining our statute books, since the establishment of a republican government in this country, we find a

large portion of our municipal laws devoted to the same laudable purpose. Perhaps, in no state in the union, or on earth, does there exist, in proportion to its population, a greater number of privileged corporated bodies, than are at this day established in the state of Louisiana. What will become of all our institutions for the municipal government of our towns and cities, for the establishment of schools and colleges, for the formation or improvement of roads, bridges and navigable streams, for the support of the numerous temples of religion, and asylums of charity, and repositories of learning, which already sanctify or adorn our infant commonwealth, if the destructive doctrine of this resolution be carried into effect? What will become even of that excellent institution, the State Bank, which has the honour of numbering so many of our worthy legislators among the directors of its country branches, and the felicity no doubt of accommodating them with occasional loans? The privilege which that justly popular institution enjoys, of lending its funds at an interest of one half, or 50 per cent. more than any other bank in the state is permitted to take, subjects it to this legisla-

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tive anathema, and requires its destruction, as "adverse to, and incompatible with the genius and spirit of a free people."

It is extraordinary, that any one should hold this doctrine, who looks round him, and views the numerous and wonderful public works which have been accomplished in the space of a few years, by our privileged corporate bodies. Observe only what has been done by the corporation of the city of New-Orleans; a body which holds, and very freely exercises, the high privileges of taxing its inhabitants. Were any one, who had only known this city under the Spanish government about twenty years since, to be suddenly transported to it now, the changes that would immediately strike his eye might seem the effect of enchantment. In place of a poor, small, straggling town, he would behold an extensive, opulent, and noble city. Instead of the dirty, dismal, impassible roads of former times, he would see spacious streets, clean, well-paved, and lighted with lamps fit to illuminate Armida's gardens.

Corporate bodies give cohesion, strength and harmony to the individual elements that compose a commonwealth. By their united

efforts, sustained and animated by the combined motives of public spirit and personal interest, can best be accomplished and preserved those stupendous works of public utility, too expensive to be undertaken by individuals, and requiring too constant a vigilance, and too minute an attention to matters of detail, to be well maintained by the agency of the government of a state. The exclusive privileges of such corporations as that which I now defend, are not only not adverse to, or incompatible with the genius and spirit of a free people, but the direct contrary is the fact. They form one of the peculiar characteristics by which the freest states are distinguished. They never have been known to exist, they could not exist, except in a free state. It is only in one or two nations of Europe, and in the united states of America, that they are found at all. Who, indeed, would be so improvident as to expend his fortune under an arbitrary government, in forming or improving a navigable stream, when he could have no security, nay, when he might be certain, that as soon as the tolls were worth receiving, the despot would seize upon them for his own use, or grant them

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to some of the slaves who supported his tyranny? Let us suppose, what please God will never happen, that this country should be retroceded to the Spanish monarchy—that monarchy being such as it was twenty years ago—then, I maintain, that neither our privileges, nor those of any other useful corporation in the country, would survive the cession for twelve months. Some pretence would soon be found for confiscating our property; and our revenues, instead of being appropriated to promote agriculture or commerce, or to indemnify industry and enterprize, would be squandered away on some court pageant or debauchery. The truth is, that such useful and privileged bodies as ours, are, in their nature, absolutely incompatible with the genius and spirit of a tyrannical government. Exclusive privileges! Why, the state itself, and the whole fabric of its government, are founded upon them. The sovereignty of this commonwealth is exercised to the exclusion of more than nine-tenths of all its inhabitants. From the exercise of the lowest political privilege, *to wit*, the right of suffrage, the constitution excludes; first, the whole female sex; then all males under the age of

twenty-one years; next, all others who are not free white citizens of the united states; and lastly, all of these who have not resided one year in the county in which they offer to vote, and paid besides a state tax.—These exclusions leave about 7000 privileged voters, out of a population of 150,000 souls: and it is the opinion of our most sagacious and experienced politicians, that the basis of our democracy could not be much widened without endangering the state. This basis is as broad as that which supported the democracy of Athens, the most illustrious republic of the ancient world.

And now, let us be permitted to call our accusers before the great sovereign council of the enlightened, the highly privileged (the morally and politically privileged) electors of this commonwealth, to whom those accusers are immediately responsible, and ask them, was it just to denounce us to the public, as they have done, without a particle of proof to support their accusations; to assail us not merely by figures of speech, but by fictions of fact? Was it wise or expedient, was it even pardonable in them, to allow themselves, in their hostile zeal against one corporation,

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to assert and proclaim, in a solemn manner, principles not only destructive of all the chartered institutions of the state, but utterly subversive of that very constitution which made them legislators, and which they are bound by their solemn oaths to support? Are they aware of the dreadful consequences which legislative denunciations of this kind are calculated to produce, and have frequently produced, not in remote ages and nations only, but in our own times, and among a people of the same race as that which constitutes a majority of our population?—If they cannot satisfactorily answer these questions on the day of *their* trial, the next general election, we must demand from the people a judgment of *ouster* against them.

They declare further, that highly favored monopolies and exclusive privileges, tend manifestly, in their oppressive operations, to the alienation of the affections of the citizens for their government. "By your fruits shall you be known," is a good maxim in politics as well as in morals. Let *us* then, and all the other privileged corporations of the state, be judged by this maxim. If, notwithstanding the great number of those bodies

that are established, and in constant operation here, the patriotism of our people be pure and ardent, this proposition of the preamble is as groundless as all the others, or we must be innocent of the oppressions laid to our charge. A few years ago, when our highly favored monopoly was still draining the purses of its proprietors, and most of our privileged corporate brethren were filling their own, this country was invaded by a veteran, and till then, victorious army, superior in number to the whole male population of the state, capable of bearing arms. The event was one calculated, together with the long blockade of the lakes and the river, to put the affections of the citizens for their government to a severe trial. What was the result? The noblest display of patriotism and courage on their part, and the utter defeat and discomfiture of the invader in a few weeks. I really doubt, whether the people could have better testified their attachment to their government and their country, even in the good old times when Louisiana was not afflicted with any of those odious and liberticide *exclusive privileges*, so eloquently denounced by the legislature; when there were no toll roads, no toll

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ferries, no toll bridges, no toll canals; no privileged banks, or steam-boat companies, or navigation companies, or library companies, or incorporated schools, academies or colleges, or protestant churches, or Poydras asylums, for the relief of the widow and the orphan; when there were no privileged electors of governors, senators, or representatives; no jurors selected exclusively from the class of respectable freeholders; when all the waters of the province were as free as its air, and the bayou St. John could be navigated without paying a maravedi,—by every canoe and pirogue that could crawl or be dragged over its numerous bars and sand banks.

Whatever the authors of the resolutions may be pleased to think of our affection for *them*, we will give them an unequivocal proof of our warm and rational attachment to the genuine principles of our republican government: We will convince them that we know enough, and what is more, that we feel enough, of the true spirit of a free people, not to shrink from making a fearless defence of our rights, and the rights of all other proprietors, corporate and individual, which this

prosecution may jeopardize, even though the highest authority in the state is our accuser.

But we do not now, nor did we in the court below, as it has appeared to the counsel, treat this cause with contempt. I have endeavoured, and will again endeavour to answer every one of his arguments and observations; though in doing this, it may not be possible to be always grave, or even serious. There are some sophistries so exceedingly ridiculous, that nothing but ridicule can expose their absurdity.

The counsel makes many assertions respecting the effects produced by the tolls of the navigation company, in involving a large portion of our citizens, on the other side of the lake, in distress, incredible to those who have not seen it with their own eyes;—in sacrificing our cotton merchants;—in driving our wealth from its natural channels, &c.; of which assertions the record does not furnish one word of proof. But that record, as well as our own certain knowlege, gives a direct contradiction to several of those assertions. The assertion, for instance, that the lake Ponchartrain "is now navigated but by a few schooners," is contradicted by almost all the wit-

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nesses. The pathetic complaint, " that our eggs and butter at breakfast, our meats at dinner are dearer, because, *there is not a vessel which transports them to market that is not taxed*," we all know to be unfounded. We all know, that the far greater number of the vessels which bring those good things to market, bring them by the Mississippi, and are not taxed at all; and those who are in the slightest degree acquainted with the principles of political economy, or the ordinary transactions of commerce, know that the price of the article which pays no tax, must always limit and keep down the price of the like article, which cannot be brought to market without paying a tax, whatever the amount of that tax may be. Nor is it by any means correct, that " the avarice of the company emulates the folly of him who killed his goose that laid golden eggs, to get them all at once." Without presuming to question the propriety of the simile by which the learned counsel compares his clients, " on the other side of the lake," to that silly animal, the *goose*, I would remark, that there is evidence here to prove, that we are not so stupid as to kill that goose for her golden eggs. The accounts of the

company on record shew, that for two or three years past our tolls have been gradually improving; or to express myself conformably to the gentleman's ingenious metaphor, his geese lay more eggs for us now than ever they did. Their "loud and incessant" cackling has not in the least diminished their productiveness.

In answer to the demand made upon us, to shew by what authority we claim to be a corporate body, and to exact tolls from those navigating the bayou St. John, and the canal Carondelet, we rely on the act of congress passed on the 4th of March, 1804, providing, among other things, for the temporary government of the territory of Orleans; and on the charter of incorporation, granted to us on the 3d of July, 1805, by the legislature, which was established here, in virtue of that act. In opposition to this claim, the counsel insists:—

1st, That congress have no power to govern the territories of the united states, and their acts for the government thereof, are null: and 2d, That, if they even had that power, they could not delegate it to the governor and legislative council of the territory of Orleans, from whom we derive our charter.

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Desperate an undertaking as it was, to maintain these doctrines, at this time of day, it was yet necessary for the counsel to make the attempt; for if the legislature of the late territory of Orleans was lawfully constituted, our charter is invulnerable.

The article of the constitution of the united states, giving power to congress to make all needful rules and regulations, respecting the territory, or other property, belonging to the united states, is decisive to overthrow this newly raised objection. The word, territory, like the word country, includes men as well as soil; and it is generally understood among us, in its most extensive sense. When we speak of the real property belonging to the united states, we most frequently call it the public land.—But independently of this article, the treaty-making power given to congress, together with the general power to make all laws which shall be necessary and proper for carrying into execution the powers of the government, would be amply sufficient to confer upon congress the authority to form governments for all those territories which the united states might acquire by treaty. To allow the federal government to obtain the cession of a territory or province, without

having any power to govern it afterwards, would be an absurdity which no men of common sense, still less the enlightened framers of our constitution, could commit. And if congress have power to form a government for such a territory or province, they must necessarily have the power to delegate suitable persons to carry that government into effect, in so far as they may not themselves be competent or perfectly qualified for that purpose. They may well and wisely legislate for the territory in which they hold their own sessions, but they could hardly do so for a province in South America, or an island in the East Indies.

The constitution does not expressly give to congress the power of establishing any bank or other corporation, yet it has been decided by the highest legislative and judicial authorities of the united states, that that power may be exercised when such an establishment is deemed by congress necessary and proper for carrying the powers of the federal government into execution. Let me quote, on this occasion, the words of our most able and celebrated judge:—"We admit, as all must admit, that the powers of the government

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are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature, that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the constitution; and all means which are appropriate; which are plainly adapted to that end; which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."—Again; "the propriety of this remark would seem to be generally acknowleged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the constitution. The power to 'make all needful rules and regulations respecting the territory, or other property, belonging to the united states,' is not more comprehensive than the power to 'make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial

government, which is a corporate body." From chief justice Marshall's opinion on the constitutionality of the bank of the united states. 4 *Wheaton's Rep.* 421, 422.

We see, at once, the pernicious tendency of this prosecution. It has been deemed proper, by the opening counsel, in order to support it, to maintain a doctrine which would abolish our civil and penal codes, our principal laws for regulating judicial proceedings, and all the corporations authorised previously to the establishment of our state government. All of these, if null in their origin, must be null and void still. If they were not laws in force in the territory, at the time of the adoption of the state constitution, they cannot come within the provision of the fourth section of the schedule; which provides, that all such laws shall continue and remain in full effect until repealed by the legislature. The counsel is really a keen sportsman in this forensic chase. Rather than fail to run down and kill his game, he is disposed to destroy his dogs, his horses, himself, and every thing around him.

Here I might quit this subject; but the learned gentleman has permitted himself to

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make, in reference to it, some inconsiderate and highly incorrect remarks, which I cannot suffer to pass unnoticed. He represents the act of congress, providing a government for the territory of Orleans, as an unconstitutional usurpation of power; a tyranny, in short, like that which Great Britain formerly exercised over us. On this point, my opinion, and I trust that of every one in the community, is diametrically opposite to his. The conduct of the government of the united states towards this country, has been distinguished by wisdom, prudence, and the utmost purity and plenitude of good faith. A temporary government, the best, perhaps, which circumstances allowed, was formed at first, and that government was gradually liberalized and republicanized, in as short a period as the former condition of the people rendered possible, until the territory was finally established as a sovereign state of the union. Nor did the congress, even in this short interval of political protection and preparation, subject the commerce or the agriculture of the territory to any monopoly, disability or restriction. On the contrary, her ships, and all the valuable articles of her produce, were immediately entitled to the

privilege of being admitted, free of duty, into every port of the united states. Will the counsel venture to compare this liberal and generous policy with the policy of Great Britain, not merely towards the colonies she intended to oppress, but even towards the most favored of her acquired possessions? Will it be maintained, by any one of the slighest political experience, that a people, subjected for ages, to the rule of an absolute monarchy; a people consisting of various races and casts of men, can, without danger, be all at once invested with all the rights and privileges of democracy? The conduct of our general government towards Louisiana has, on the whole, been such as should induce every Spanish colony, situated as Louisiana was at the time of the cession, to desire most earnestly to be incorporated, like her, into our confederacy, as one of its free, independent and sovereign states.

It is contended, that if the governor and legislative council of the territory of Orleans, were constitutionally established, they were restrained in the exercise of their legislative powers, to rightful subjects of legislation; and that, in granting the charter now attacked,

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they transcended those limits, and did not act on a rightful subject of legislation.

If, to improve the inland navigation of a country, be not a rightful subject of legislation, I know not what is one. I think it is among the fitest subjects upon which legislative wisdom and power can be employed.

Of all laws, the most important, perhaps, are those which secure the lives, the persons, the reputation, the civil and religious liberties, and the political power of the citizen; for those laws form the best foundation of his independence, and dignity, and enjoyments, as a *moral* being. In the second degree, I should place those laws which increase his *intellectual* pleasures, and promote his *intellectual* improvement; those laws which encourage literature and the liberal arts and sciences; those which favor the establishment of schools and colleges, libraries, theatres, and philosophical societies. The next in excellence, are the laws which administer to the *physical* wants and comforts of the people; those laws which advance agriculture or manufactures, or give life to commerce; those which provide for the formation of roads, bridges, canals, or any other means of internal improvement.

The law before you, belongs, in relation to its final objects, to the last class; but the means it contemplates for obtaining them, have such a connection with science, as entitles it to a higher rank. The art of inland navigation is, in fact, one of those by which free and enlightened nations are more particularly distinguished from those which are enslaved, or barbarous, or imperfectly civilized. What art more useful, more noble, more entitled to legislative encouragement, than that which enables man to drain the marsh, to fertilize the desert, to command the rocks to disappear, and the mountains to open, to facilitate the commercial intercourse, and multiply the means of subsistence and comfort of a whole community? The legislature of this territory were invited, by the state of the country itself, to the subject of inland navigation. Nature has done so much for us, in intersecting our almost level soil, with innumerable rivers and bayous, that we can easily improve her bounty. We have no rocks to blast, no mountains to perforate, no expensive locks to erect; we have only to clear away, deepen, extend, and unite the

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channels of water communication already so abundantly provided for our convenience.

The legislature of the territory of Orleans, adopted the most equitable and most effectual means for making these improvements. They chartered a corporate body for that purpose, and authorised them, in order to indemnify themselves for the large sums necessary to be expended, to receive certain tolls, but not until certain specified improvements should have been made; when, for instance, they should have improved the navigation of the bayou St. John, so as to admit, at low tides, vessels drawing three feet water, from the lake Ponchartrain to the bayou bridge; then they might take from every vessel passing in or out of the said bayou, a toll not exceeding one dollar per ton, of her burthen; and when further improvements should permit, vessels drawing three feet water to pass from that bayou, by the canal Carondelet, to the basin, they should be entitled to an additional toll, not exceeding another dollar per ton. *Vid. sec.* 9 *of the act.* 3 *Martin's Dig.* 186. It was certainly more just to take this method of improving the navigation in question, than to effect it by imposing a general

tax upon the whole community. For, although all the citizens are benefited by every amelioration of this kind, yet all are not benefited in the same degree. Those who navigate any waters, and derive the immediate and principal profit from the commerce which they increase and facilitate, should bear the expence of improving the navigation of those waters. It would be as unreasonable to compel the citizens of Oppelousas and Ouachita to pay for clearing out the bayou St. John, and the canal Carondelet, as it would be to oblige the inhabitants of New-Orleans to build every new bridge that might be wanting in those counties. We have authorities, precedents and examples innumerable, to justify the legislature that granted this charter. The opinions of the most celebrated jurists, statesmen, and political economists; and the acts of those legislatures who best understood and most profoundly reverenced the true principles of republican legislation. I will refer the court to a few of these—to the laws of Maryland, (November, 1784) for improving the navigation of the Patowmack—to the laws of Virginia, for improving the navigation of James river, 1 *Virg. Rev. Code*, 440; and of

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Willis river, 2 *Virg. Rev. Code, appendix*, *p.* 10; and of the river Slate; of the Rivanna, and of the Shenandoah, *p.* 22, same appendix; and for making the Dismal swamp canal, *p.* 27—to the laws of Pennsylvania, for improving the navigation of the Tulpehocan, 4 *Penn. Acts*, 88; of the Brandywine, *p.* 257; of the river Lihigh, 5 *Penn. Acts*, *p.* 280—and to the various laws of the state of New-York, for making those great canals which are already among the wonders of this new world. I will add the statutes of our own state, for improving the navigation of Fausse riviere, 2 *Mart. Dig.* 338, 342; and of the bayou La Fourche, *ib.* 358; and of the Amite and Iberville, 3 *Mart. Dig.* 150; and to the act to construct a basin to communicate from the Mississippi to Marigny's canal, *Acts of* 1819, *p.* 110.

The laws I have quoted are in most respects similar to our charter. They establish companies with a joint stock, and authorise them to take tolls as soon as they shall have performed certain works, or made improvements for navigation of a specified nature and extent. Several of those acts put limits to the profits to be derived from the tolls; some

of twenty per cent; others of twenty-five per cent. on the capital stock. Our charter limits our profits to fifty per cent., at the most; though it may be remarked, that in the charters given to our banking, insurance, and other corporate bodies, there is no limitation of dividends or profits whatever. This is the clause in our charter, not giving or allowing us a cent, but merely limiting and restricting our possible profits, which the opening counsel has the fairness and candor to represent as subjecting a part of our state "to an exorbitant, interminable tax;"—"a tax which must necessarily create a monied aristocracy of those who enjoy it, because they are allowed fifty per cent. per annum, on their capital, for ever." And yet he had before him the uncontroverted evidence, that the whole of the dividends received by the company since their establishment, amounted to not much more than five per cent. per annum, on that capital.

Of the laws referred to, the far greater number are for improving rivers and streams that were already navigable in some degree; and not merely for digging canals where none previously existed. The first is surely as rightful an object of legislation as the other.

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It is quite as advantageous for the public, that large sea-vessels should be able to navigate where nothing but canoes and pirogues could before pass, as that boats should navigate where nothing but horses and carts could formerly travel.

The acts of all those legislatures enforced, acquiesced in, and approved of, ever since the establishment of our federal government, might, one would suppose, remove all doubts concerning the constitutional validity of our charter, even from the sceptical minds of the jurists of St. Helena and St. Tammany. It has been considered by our highest judicial authority, that even "a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which, the great principles of liberty are concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be

lightly disregarded." *Judge Marshall on the United States Bank question*, 4 *Wheat.* 401. Other highly respectable opinions to the same effect, may be found in 1 *Cranch*, 309; 4 *Wheat.* 624; and 3 *Martin's Rep.* 669.

The adverse party insists, that the bayou St. John was public property, free and common, as a *public highway*, for the use of all the people of the united states; and that, by this charter, it has been alienated in favor of the defendants, in violation of the constitution, and of all public right.—No such alienation or disposition of that stream, or of the use of it, has been made. It is still, and ever has been since the company has had the charge of improving it, a public highway, free for the use of all the citizens of the united states.

The counsel is greatly in error, in supposing that a canal, river, or road, ceases to be a public highway, free for the use of all, because a toll of indemnity is required from those who make use of it. All the inland navigations, whether of natural rivers improved, or of artificial canals formed, in pursuance of the laws I have before cited, are considered, and in most instances are expressly declared

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to be, for ever public highways; as are all turnpike roads and toll bridges, which are made in pursuance of legislative acts. By the 10th section of the statute for clearing and improving the navigation of James river, 1 *Virg. Rev. Code, p.* 443, it is provided, that the said river, and the works to be erected thereon, when completed, shall for ever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the tolls imposed by this act. The 12th section of the act for opening and extending the navigation of the Shenandoah, 2 *Virg. Rev. Code, appendix, p.* 27, has a similar declaration in nearly the same words. Almost all the canal and turnpike, and toll bridge acts have clauses to the same effect. We see, then, that a *public highway*, free to all, is not contradistinguished from a *toll way*. The true meaning and intent of the expression, public highway, is to distinguish it from a *private way;* from ways, whether rivers, canals, or roads, which are private property; and from the use of which, the proprietor might exclude whom he pleased. Formerly, under the feudal regimen, many rivers, or portions

of rivers, belonged exclusively to individuals, who exercised in them the right of fishery, the right of making wiers and the like. Even at this time, in the united states, and this state of Louisiana, a man may have an exclusive property in the canal he digs on his own ground for his mill, or in the road or bridge he makes for his own use, on his own plantation. It was evidently to prevent any appropriation or exclusion of this kind, that the statutes already mentioned, contained the declaratory provisions to which I have referred.

And these statutes were ordained by the distinguished legislators of Virginia; a state always eminent for her legislation and jurisprudence; by men who cultivate, and successfully cultivate, during the greater part of their lives, the science of public law and political economy.—So conscious, indeed, are our Virginian brethren, of their superior political knowlege and talents, that it is said they are generously disposed to rule over every state in the union, as well as their own, and to relieve all their fellow-citizens from all the cares and anxieties of self-government.

From these considerations, and especially from these legislative precedents, we may

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learn the true construction of the words used in the ordinance for the government of the north-western territory, and the other acts of congress, on which the learned counsel so confidently relies. When it is declared, "that the navigable waters leading into the Mississippi and the St. Lawrence, shall be *common highways, and for ever free*, as well to the inhabitants of the said territory, as to the citizens of the united states, &c. without any tax, impost or duty therefor." *Ordinance, art.* 4. 1 *Martin's Dig. p.* 196. "That all the navigable rivers and waters in the territories of Orleons and Louisiana, shall be and remain for ever *public highways*." *Act of March* 3, 1811. 1 *Martin's Dig. p.* 314. "That it shall be taken as a condition upon which the said state, Louisiana, is incorporated in the union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be *common highways*, and *for ever free*, &c. without any tax, duty, impost or toll therefor, imposed by the said *state*."—See the acts to enable the people of the territory of Orleans to form a constitution, &c. *sec.* 3, and the act for the admission of the state of Louisiana into the

union, &c., *sec.* 1. 4 *Bioren's Laws of the United States, p.* 329, 402—nothing more is intended than to declare, explicitly, that the waters in question shall be *public highways*, and not *private ways*, for the use of any particular person or persons exclusively. This is clearly proved by limiting the exclusion of all taxes, duties, imposts or tolls, to those which might be imposed by the said *state*. Never could it have been the intention of congress to prevent the new states from clearing, improving, and extending any of the navigable, or partly navigable waters, which God had given them, or from forming new channels of navigation: nor to prohibit them for ever from effecting those purposes by the most reasonable, the most effectual, and the most usual means; that is, by the agency of joint stock corporations, to be indemnified by tolls, paid by those who should profit by their labours. The grand object of the ordinance, and of all the laws in question, was to provide for the establishment of states, and permanent governments therein, and for their admission to a share in the federal councils, on *an equal footing with the original states*, at as early a period as might be consistent with the gene-

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ral interest—See the last paragraph of the 3*d sec. of the Ordinance.* 1 *Martin's Dig.* 192. Could congress then have contemplated to deprive these new states of a means of internal improvement, prosperity and opulence, employed by every one of the old states, whose local situation and other circumstances, allowed them to avail themselves of its advantages? Congress never entertained such an invidious, illiberal disposition. We shall presently shew, with respect to our own particular company, that they have not only recognised, consented to, and approved of our charter, but have afforded us their generous aid in furtherance of our operations.

The bayou St. John, alienated! The bayou St. John not a public highway! Not free and open to all the citizens! Every one who will use his eyes, may be convinced of the contrary. That bayou, which, before the establishment of the Orleans Navigation Company, was an unsafe, obstructed, miserable channel, is now a great public highway for the vessels of all nations; and *we have made it so.* That bayou which was formerly shut up and occluded by bars and sand-banks, and innumerable other embarrassments, we have opened and

made free; really free for the use of all who choose to navigate its waters. Where one vessel could navigate it heretofore, a hundred, a thousand vessels may navigate it now. It is as free as it was possible for art to make it.—The navigation of that stream, of almost vital importance to our now populous city, can no longer be monopolized by the lime-boats and pirogues which formerly managed, though not without great risk and labour, to force their way through its shallow, encumbered channels. And this may be the real cause of the outcry set up by certain persons against our enterprizing, public spirited institution. They find that their wretched craft cannot maintain any competition with the fine, large, well-rigged, well-manned vessels, which we have enabled to sail from the lakes into the heart of the city. They cannot bear to see the bayou "ploughed by bolder prows than theirs;" and they know that if our company were destroyed, the navigation of that stream would soon be deteriorated to its pristine state, then they might again possess the same monopoly of it which they enjoyed in the good old times.

The learned counsel's notion of a public

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highway, free to all the world, is like that of a certain worthy Hibernian, concerning a free port. On arriving with his ship at New-York, which he was assured was, like all the ports of the united states, a free port, he was utterly astonished to find that he was obliged to pay a tonnage duty on his vessel, impost duties on his goods, and wharfage besides for the liberty of landing them on the quay. After all this, he was not so much surprised when he went to the Fly-market, which he heard was a public market, free and open to every one, to learn that he could obtain nothing there without paying for it.

It is contended for the prosecutor, that if a duty of one dollar per ton can be laid on vessels navigating the bayou, in favor of our company, a like duty of fifty dollars per ton might, in principle, be equally imposed; and that such a duty would be a complete alienation of the bayou to the company, by excluding all vessels from it. The answer to this objection is obvious. Our own interest would be a security to the public, that whatever toll we might be authorised to exact, we should not impose one which would prevent vessels from navigating any of the waters we might

improve. Such an imposition would ruin ourselves. If we charge too much, our customers will quit the bayou for the Mississippi. When it is known, that we demand at present, tolls far below what we are permitted by our charter to require, how can it be fairly presumed, that we should exact more than we now do, although we were at liberty to charge fifty times the amount?

The counsel insists, that our charter, so far as it relates to the canal Carondelet, is void, because it grants to us a certain soil belonging to the united states; that, *to wit*, on which the canal Carondelet is dug; when, by the territorial constitution, the governor and legislative council were expressly prohibited from the primary disposal of any part of the soil of the united states.

It will be time enough for us to answer this charge when it is brought by the united states, the alleged owners of the soil in question. The soil of the canal Carondelet is, and will remain, what it was intended for, a public highway. If the united states ever had any claim to it they have fully and repeatedly authorised us to use it, as we now do, for a navigable canal, free to all who choose to navigate it.

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It is further maintained, that the toll granted by the 9th section of our charter, is in violation of that article of the constitution of the united states, which declares, that the "congress shall have power to regulate commerce with foreign nations, and among the several states;" and of that article, which provides, that "all duties, imposts and excises, shall be uniform throughout the united states;" and of that article also, which ordains, that "no preference shall be given by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." But it is clear, at the first view, that the provisions and restrictions of those clauses, are applicable, exclusively, to the exercise of the legislative powers conferred on congress. It never before was contended or supposed that any of those clauses could be so construed as to restrain a state from authorising toll canals, or any similar establishment, for the *bonâ fide* purpose of improving its agriculture or commerce.

There is yet one more objection to the constitutional validity of the 9th section of

our charter. It is alleged that the imposition of the tonnage duty, as it is called, which we are allowed to demand, is in violation of the provision of the 10th section of the first article of the federal constitution; that "no state shall, without the consent of congress, lay any duty of tonnage;" and it is asserted, that our charter has never received the consent of congress.

To investigate this objection thoroughly, let us first enquire whether the toll in question is really such a tonnage duty as the constitution contemplates? A duty is a tax or impost raised by a state for the use of its government. A toll, on the contrary, signifies a payment in towns, markets and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the same. 2 *Inst.* 220. Tolls were granted to the corporation of the city of Carlisle, for all commercial goods passing in and out of the city, on horses, or in carts or waggons. 5 *East's Rep.* 2. Tolls may be claimed by grant or prescription, by a town, for such a number of beasts, or for every beast that goeth through their town; or over a bridge or ferry main-

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tained at their cost; which is reasonable, though it be for passing through the king's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. *Terms de ley*, 561, 562. This toll must be for a reasonable cause, which must be shewn, *viz.* that they are to repair or maintain a causeway, or a bridge, or such like. *Cro. Eliz.* 711. Of this last kind is the toll in question. It is granted to us for the just and reasonable cause of improving and maintaining the navigation of certain waters. It is allowed as an indemnity, or if you please, as a remuneration for monies laid out and services performed.—Again, the constitution says, "no *state* shall, without the consent of congress, lay any duty of tonnage." But our toll is not laid by any state, but by a corporation, authorised by a state legislature, or which amounts to the same, by a legislature, having for that purpose, the power of a state legislature. It is, in fact, authorised by the state, inasmuch as our state constitution provides, that "all laws now in force, in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature. *Schedule, sec.* 4. In this case, no

tax or duty, of any kind, is positively established by law, although a toll is permitted, eventually, to be established by our charter. The toll emanates from a corporate power. The corporation may authorise or not authorise it, and may select the purposes to which the proceeds are to be applied. This corporation is a being intended for local objects only; all its capacities were limited to the improvement of the inland navigation of our territory. Its ordinance, imposing a toll, is a bye law, and not a state law.—This distinction between a public law, authorising a corporation to raise money in a particular manner, and the bye law by which the corporation exercises the authority thus given to it, was taken and sustained in the remarkable case of *Cohens* vs. *the State of Virginia.* 6 *Wheat. Rep.* 445.

When the duty is laid and collected directly by the state itself, then, whatever may be the alleged purpose of such duty, it is right, perhaps, that the consent of congress should be obtained; otherwise state legislatures might raise a revenue of impost, disturb the harmony of our general commercial system, and thereby violate the constitution, under the

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pretence of providing for some object of particular utility. It was this consideration, no doubt, which induced congress to declare, in the act of 1799, concerning quarantine and health laws, that nothing in that act should enable any state to collect a duty of tonnage or impost without the consent of the congress of the united states. And, through abundant caution, the consent of congress has been obtained, even to some of the state laws, which, without laying directly any tonnage duty, authorised particular corporations to impose tolls, to be regulated by the burthen or capacity of vessels. Well! if the toll claimed by us, can be considered such a tonnage duty as requires the consent of congress, we shall shew that their consent has been given to our charter, more frequently than to any other charter of the kind that was ever granted by any state in the union. Our company has had the consent of congress impliedly and expressly; nay more, it has had their approbation, their support, and their co-operation.

By the act of congress, establishing the legislature which granted our charter, it was provided, 1 *Martin's Dig.* 142, that the governor should publish throughout the terri-

tory, all the laws which should be made; and should, from time to time, report the same to the president of the united states, to be laid before congress; which laws, if disapproved by congress, should thenceforth be of no force. That the governor of the territory, and the president of the united states, performed the duties enjoined on them by this act, is not to be doubted. The law presumes, that public officers fulfil their duties, unless the contrary be shewn. But our charter has never been disapproved of by congress. They have, therefore, assented to it. I need not repeat the well-known maxim of our law, by which this doctrine of common sense is supported. To those who are at all acquainted with any system of law, or with the common business of life, the idea of an implied consent, is quite as familiar as that of an express consent. In many suits, far more important, and infinitely more agreeable than suits at law, it is well known, that consent is almost always given by silence. The constitutional article under examination, does not say, that no state shall, without the *express* consent of congress, lay any duty of tonnage. And this court well knows, that every article restricting the

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power of a state, must be construed as strictly as possible, in favor of the states, especially in a suit whose object is to annul a contract that has been unquestioned for sixteen years; and on the faith of which a number of our fellow-citizens have expended $200,000 of their property.

It is mere sophistry to ask if the governor and legislative council had passed an act to banish ten citizens, or decimate the people, whether such an act would be valid, although not disapproved by congress? With or without the consent of congress, such an act would be null and void. Our charter was, in its origin and object, a just and lawful act, which required nothing but the consent of congress (if it even required that) to give it full validity.

But the congress have not left us to imply their assent to our charter. By the 3d section of the act, respecting claims to land in the territories of Orleans and Louisiana, passed March 3, 1807, almost two years after the date of our charter, 1 *Martin's Dig.* 282, they confirm the claim of the corporation of the city of New-Orleans, to the commons adjacent to the said city, provided, "that the

corporation shall reserve for the purpose, and convey, gratuitously, for the public benefit, to the company authorised by the legislature of the territory of Orleans, as much of the said commons as shall be necessary to continue the canal of Carondelet from the present basin to the Mississippi," &c.

By an act passed on the 18th of April, 1814, 1 *Martin's Dig.* 360, the congress grant, vest in, and convey to the president and directors of the New-Orleans Navigation Company, and their successors, for the use and benefit of the said company for ever, all the right and claim of the united states, to a lot of ground therein described. And by another act, passed on the 16th of March, 1816, 1 *Martin's Dig.* 366, the congress confirm to, and vest in, the Navigation Company of New-Orleans, another lot of ground specified in that act.

The two last mentioned acts, be it observed, were passed subsequently to the act for the admission of the state of Louisiana into the union; and they completely confirm the construction I have given of the clause declaratory of the freedom of the navigable rivers and waters of the state; a clause on which

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the counsel rely so much to invalidate our tolls. The congress, with that act of admission fresh in their memory, pass two acts recognising and granting aid to our company, which they well knew then took, and had long taken, tolls on the tonnage of vessels navigating the bayou St. John.

But the congress, it is said, have been circumvented in all they have done in our favor; in favor of "an oppressive and ceaseless extortion." What! were they kept in ignorance of our charter by the governor whom the president and senate of the united states had appointed? Were the rights of the good people of the state of Louisiana abandoned as a prey to those canal-cutting, bayou-clearing, sand-bank removing knaves and tyrants, by all our senators and representatives in congress? Were Mr. Poydras, Mr. Robertson, Mr. Brown, Mr. Fromentin, Mr. Butler, all guilty of this abominable neglect of duty? If so, it is strange indeed, that they should have since received so many additional proofs of the confidence of the great body of their fellow-citizens.

I do not deem it requisite to urge the argument used on a former occasion, by an advo-

cate of the company, drawn from the direction in which the bayou St. John leads, and from the situation of the lake into which it falls. Nor will I exercise the severity of criticism on that precious morsel of poetry which the counsel has quoted: it is altogether worthy of the logic it is introduced to adorn.

It can hardly be necessary to say much on the proposition attempted to be maintained, that congress have the power, under the constitution of the united states, of rescinding any charter, of taking away any right, of violating any contract, whenever they think the public good requires it.—The conservative purposes for which congress have been established; the solemnly declared objects of the constitution under which congress exercise their powers; the sacred principles of justice and good faith which that constitution recognizes from the beginning to the end: the very positive provisions of the additional articles of that constitution; the probity, the honor, the morals, the manners, the usages of the good and great people, for whom, and by whom, the general government, arising out of that constitution, is administered; all these

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give at once a flat and indignant contradiction to that unworthy doctrine.

The parliament of England, says the learned counsel, rescinded the charter of the East India Company; and the measure was advocated by Burke, Fox and Sheridan. He is mistaken as to the first branch of his assertion. The attempt to destroy that charter was defeated in the house of lords, and the authors of the attempt were soon after driven out of office, by the justice of their country. There has been indeed, a period in the history of England, when the charters of many corporate bodies were overthrown, and that too under the colour of judicial proceedings. It was in the reign of Charles the II., one of the wickedest rulers by whom that nation was ever cursed.

No, sirs, congress has not annulled the charter, or violated, either intentionally or in fact, or authorised the violation of the solemn contract, or of any part of the solemn contract, made between the legislature and the Orleans Navigation Company, under the faith of which contract the members of that company have laid out so large a portion of their fortunes. If there were any thing in the

act for the admission of this state into the union, or in any other act of congress, prohibiting this state from improving its inland navigation, in the best and most usual mode, or from the exercise of any other right belonging to the original states, such a prohibition would itself be a violation of the constitution of the united states, and of that article of the treaty of cession (part of the supreme law of the land) which provides for the security of the property of the people of Louisiana, and their incorporation into the union, with the enjoyment of *all* the rights, advantages and immunities of citizens of the united states.

The attempt to wring from a single sentence of a law, a meaning destructive of good faith, justice and equity, and contrary to the repeatedly expressed intention of the legislator, is repelled by every sound principle and every approved precedent of jurisprudence. Even where the words of a statute do clearly import that something unjust may be done, the courts will conclude that this consequence was not foreseen by the legislator, unless his intention to permit the injustice be unequivocally expressed: without such an expression, it will not be presumed that any

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construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable. Thus, if an act of parliament gives a man power to try *all* causes that arise within his manor of Dale; yet, if a cause should arise there, in which he himself is party, the act is construed not to extend to that cause, because it is unreasonable that any man should determine his own quarrel. 8 *Rep.* 118. If congress, subsequently to their acts in favor of our company, had enacted (supposing they had the power so to enact) that all navigable rivers, waters and canals, should be free of all tolls whatsoever, whether imposed by the state or by a corporate body, then, on the principle I have just stated, the act should be construed, so as not to extend to the tolls of the Orleans Navigation Company; because it ought not to be presumed, that congress would violate a fair contract, which they had already legalised and confirmed; that they would annul a charter of public utility, and authorise a manifest injustice. This is a principle of universal law, drawn from the purest sources of moral philosophy.—"When an exception to the rule (or law) occurs, which the law-giver did not

foresee, this exception is admitted in equity, which thus supplies the defect of law, as the law-giver himself would do were he present in court, and as he would have done by amending his law, had he been aware of the exception." *Aristot. Ethic. ad. Nicom. lib. 5, c. 10. Gillie's trans. 1st vol. p. 389.*

The construction for which the opposite party contend, would be scouted even under the government of the worst tyrants that ever scourged the earth. It was an ordained maxim of the Roman emperors, that all their acts of favor and beneficence should be interpreted with the utmost extent and plenitude of liberality. *Beneficium imperatoris, quod á divinâ scilicet ejus indulgentiâ proficiscitur, quàm plenissimè interpretari debemus. Dig. 1, 4, 3.*

It is pretended that the consent of congress, however expressly it may have been given in our favor, cannot avail us, as it was not given previously to the passing of our charter.— But all the acts of congress, consenting to charters of this kind, or to state laws imposing tonnage duties, which the counsel has cited, or which I have met with, were passed subsequently to the charters or state laws, to which they related. Some of those acts of

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assent bear date many years after the promulgation of the laws which they were intended to confirm. But even if this article of the constitution of the united states could be applied to our navigation company, in the unprecedented manner proposed, it would only operate to render unconstitutional those tolls which might have been received by us, previous to the time when congress first assented to our charter; that is, to the last day of the period, when having the power to disapprove of it, they did not disapprove of it. Now, as we received no tolls at all during that period, this new doctrine, however well meant, can do us no mischief.

To all these authorities in support of the lawfulness of our tolls, I shall add one more, as respectable as any I have already adduced—the authority of the present executive government of the united states. We have given in evidence, and placed on the record, the following letter from the quarter-master general's department:—

(COPY)

June, 23*d*, 1820.

Sir,—Your letter of the 19th ult., has been received and submitted with its inclosures to

the inspection of the secretary of war, who directs that both the canal and bayou fees (tolls) on the public transports be paid. The former must not be incurred hereafter, except when it becomes necessary that the schooners should ascend to the basin in order to load.

I am, sir, yours, &c.

(*Signed*) T. CROSS, A. D. M. G.

Capt. Thomas Hunt, New-Orleans.

This order was given some time after a suit had been brought, very inconsiderately and unsuccessfully, by the company, against a vessel of the united states, which they seized in order to obtain payment for tolls. But the justice of the general government would not suffer them to resent the illegal proceeding. Would the executive, distinguished always for their vigilant attention to economy in the expenditure of the public monies, have directed those tolls to be paid, under such circumstances, if they entertained any doubt of the right of the company to demand them?

The counsel, towards the conclusion of his speech, was kind enough, in a gracious, relenting mood, to say: "We are not claiming the vested property of the company. Let them

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keep and use that in the exercise of their constitutional powers. We are contesting their right to demand property, or which is the same thing, money from us." Many thanks to the learned gentleman, for the intended favor!—he only means to take from us our *tolls*, our *revenues*, the *only interest* or return we can ever have, or expect to have, for our money, and then he will leave untouched our property; our *capital*, which is already laid out and expended for the public benefit, and *gone for ever!* His beneficent intention, in this respect, reminds me of the goodly project of a certain Scotch economist, for expunging the national debt of Great Britain.—Feeling, or pretending to feel, some qualms of conscience at a scheme of public robbery so extensive, ruinous and atrocious, this scrupulous enemy of exclusive rights and privileges proposed that "nathing but the *interest* of the debt should be abolished, and that the national creditors should be left at fu' leeberty to take a' their *vested capitol—whare'er they cou'd find it.*"

Lastly, it is contended by the prosecutor, that if the charter of the company was rightfully granted, it has been forfeited by the

nonfeasance of the company, in not completing the navigation from the bayou St. John to the Mississippi river.

An attentive perusal of the 9th section of the charter, on which this attack is founded, will satisfy the court, that whatever might be the intention, or wish, or purpose of the government in granting the charter, or of the company in accepting it, neither party has promised or stipulated to perform, or cause to be performed, the work which we are alleged to have neglected.

This section enacts, that as soon as we shall have improved the navigation of the bayou, so as to admit, at low tides, vessels drawing three feet water, from the lake to the bridge, we shall be entitled to receive a toll on every vessel passing in or out of the bayou, not exceeding one dollar per ton. That when farther improvement shall permit vessels drawing three feet water, to pass from the said bayou, by the canal Carondelet, to the basin, we shall be entitled to an additional toll, not exceeding one dollar per ton; that when the navigation shall be improved, so as to admit vessels drawing three feet water, from the lake, to any place within one hundred yards

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of the Mississippi, we shall be allowed a farther toll, not exceeding one dollar per ton; and that when the communication between the said navigation and the Mississippi shall be made complete, every vessel passing from or into the said river, shall be liable to a toll, not exceeding five dollars for every foot of her draft.

What is the meaning of this language of the legislature? If you perform certain services, respecting this navigation, you shall be entitled to a certain reward: when farther services, to a still farther reward. There is no specific engagement, there is no engagement whatever on our part. There is no obligation or liability on the part of the public, until we shall have earned our reward, according to the terms their representatives thought proper to prescribe. This is wholly unlike the ordinary contracts to which it has been compared. In those contracts, each party makes a covenant, a binding promise. I engage to give, or to do so much for you, in consideration of which you engage to give, or to do so much for me; or *vice versâ*. In our case, the engagement is not positive, but hypothetical. We could break no covenant, for we made none. If we

do certain things, we shall enjoy certain privileges. Did the counsel ever know, or can he conceive, that an action for breach of covenant could be supported on such a convention, and against the party who makes no covenant whatever? Suppose the owner of a tract of land should stipulate with a woodcutter in these words—if you will clear one hundred acres of my land, of all the wood growing on it, I will pay you a thousand dollars; and when you clear another hundred acres in the same manner, you shall have a thousand dollars more.—If this person should clear only ninety-nine acres, he would not strictly be entitled to a cent. But if he cleared one hundred acres, would he not be entitled to his full one thousand dollars, though he should refuse to clear an acre more? Had we expended our whole capital without being able to get three feet water at low tides, on the whole extent of the navigation from the lake to the bayou bridge, we should not be entitled to demand any toll whatever. But, if with that capital, we had accomplished no more than the proposed improvement of that extent of the inland navigation, surely we should have been entitled to the indemnity expressly

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stipulated for that specific service. If, afterwards, when urged to clear the canal Carondelet and the basin, we should plead our inability, the utmost that could be said to us by the public, would be—if you cannot perform this work, we will propose it to some one else. But to deprive us of the wages we have already earned, because it is not in our power to earn any more, would seem, in ordinary cases, an injustice too flagrant to be attempted or thought of.

The laws of all the states which have legislated on the subject of internal navigation, confirm the decision which the common sense and common honesty of mankind would pronounce on this accusation against us. Whenever it is intended, that the non-performance of a specified work or improvement, shall cause a forfeiture of any right or privilege granted, it is so declared expressly; so that if the advantages offered be not deemed equivalent to the risk to be incurred, the charter need not be accepted. In the 19th section of the act for improving the navigation of James river, 1 *Virg. Rev. Code*, 445, it is provided, that if the company shall not begin the intended work within one year, or shall not com-

plete the same within ten years, then all preference in their favor, as to the navigation and tolls in question, shall cease. In nearly all the inland navigation statutes, which I have already quoted, there are similar enactments: and a great many subsequent acts were passed, extending the periods at first limited, instead of rigorously insisting on the right of forfeiting the charters for nonfeasance. So much have these corporations been favored by the enlightened legislatures of the most distinguished states of our confederacy.

The words in the 9th section, "when the communication between the said navigation of the river Mississippi shall be made *complete*," mean nothing more than when the canal shall be extended to the Mississippi: the construction attempted to be given to those words, even if there were any positive stipulation on our part, could only be specious, if the *sole* purpose of the act had been to open a navigable communication between the bayou and that river. But the purpose of the act, as expressly declared in its first section, as well as by its title, was to "improve the inland navigation of the territory of Orleans." Therefore, according to the extraordinary in-

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terpretation for which the learned counsel contend, we should be liable to forfeit our charter for nonfeasance, if any part of that territory which might be susceptible of the contemplated improvements, should remain unimproved. Our charter, in short, would not be secure, until we should make every possible improvement within the range assigned for our operations.

In support of his argument, the gentleman offers the 22d article, *p.* 92, of the *Civil Code*, which enacts, that a corporation may be dissolved—first, by an act of the legislature, if they deem it necessary or convenient to the public interest;—and secondly, by the forfeiture of their charter, when the corporation abuse their privileges, or refuse to accomplish the conditions on which such privileges were granted.

The first paragraph of this article can only be construed to extend to those corporations which are formed for internal government, municipal administration, or the like; not to those which embrace contracts with respect to property. 4 *Wheat. Rep.* 629. The last are protected by that article of the constitution, which forbids state legislatures to pass

any law impairing the obligation of contracts. But there is no question, at present, on this subject. We are only required to shew that our charter has not been forfeited by misfeasance or nonfeasance. On this last ground, it would be manifestly very hard to annul our charter and deprive us of our rights, for not performing what we are utterly unable to perform. But the counsel insist on it nevertheless. Like Shylock, they stand upon the law. Well then, rigorous prosecutors, take your pound of flesh, *if you can find it in the bond.* What is that condition, tell us, which we refuse to accomplish, and on which any privilege exercised or claimed by us has been granted? We claim the privilege of receiving tolls on vessels coming to the bayou bridge, or the basin; the conditions on which that privilege was granted, were, that we should improve the navigation of the bayou, and the canal Carondelet, to a certain specified extent; and we have completely fulfilled those conditions. When you can find in our charter, that the junction of the navigation already completed, with the Mississippi, is made a condition for exercising any right or privilege we have ever claimed, then, but not till then, demand such justice as Shylock would exact.

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The statement given by the counsel, of the means of the company for carrying on the navigation of the river, is calculated to make a very incorrect impression. He says, that we have sold lots to the amount of $98,000, besides which, congress had appropriated $25,000, for the purpose of completing the canal. The lots of which he speaks were purchased by us, as the evidence shews, from the charity hospital of this city, for $28,633 8 cents, (all charges included) the whole of which sum was actually paid down; and paid too, out of the monies which might have been justly shared as dividend. These lots were afterwards sold by us, not for cash paid down, but on census, as it is termed; that is, for an interest on the capital of the price, the purchaser having the option to pay that capital, or the interest of it, for ever. In this sale, the capital of the price amounted to $98,325, and the interest thereon, stipulated at the rate of 6 per cent., to $5899 50 cents per annum.

It is evident that the purchasers will always prefer, as they have hitherto preferred, paying the interest to paying the capital, so long as the market rate of interest here shall exceed 6 per cent.; and that will probably be

for ages to come. This annual interest, together with a considerable portion of the toll received, has been, and still is appropriated to making and maintaining the requisite improvements in the navigation. There are many men who would have appropriated the proceeds of so fortunate a speculation in a very different manner: who would have sold those lots,—whose value our improvements had so greatly enhanced—for ready money, and made a dividend of the nett profit, to indemnify themselves in part, for their former losses. But instead of taking this fair advantage of circumstances, the navigation company—those persons, who, according to the counsel, 'are thoughtful only of their own pockets'—reserve the whole gross amount in perpetuity, (without even deducting any thing to replace the purchase money which they had taken from the proper fund of dividends) to promote the public objects of the institution. Their generous and public spirited conduct in this respect will be better appreciated when it is known, that from the granting of their charter in 1805, to the year 1809, and from 1813 to 1818, a period of about nine years, they received no dividend, no interest

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whatever on their capital: so great were the expenses of making and maintaining this navigation. There is scarcely a storm that does not occasion a heavy loss to the company. The repairs of the damage done to their works by the crevasse of Macarty's plantation, cost them no less than $23,774 86 cents.

Congress, it is true, did, by their act of Feb. 10th, 1809, 4 *Bioren*, 201, appropriate the sum of $25,000, to enable the president of the united states to cause the canal of Carondelet to be extended to the Mississippi, so as to admit an easy and safe passage to gun-boats, if he should be convinced that the same was practicable, and would conduce to the more effectual defence of this city. Not a dollar of this appropriation was ever received by the company; and no attempt was made to extend the navigation to the river; the president being probably well convinced of the utter inadequacy of the means offered to the end proposed. No evidence has been given of the probable cost of the contemplated work, but we may know what the legislature of this state thought of it, by referring to the act of March 6th, 1819, for the establishment

of a company for the purpose of digging and constructing a basin to communicate from the river Mississippi to Marigny's canal. For that *sole* purpose,—without having in view the making or extending of any navigable canal,—the general assembly deemed it necessary to allow the company to raise a capital of 200,000 dollars.

We are not only not bound, but we are virtually prohibited by our charter from extending the navigation of the bayou and canal Carondelet to the Mississippi. To effect what we have already accomplished, has required the whole of our capital, and a great part of what ought to have been our interest upon it; but we are not permitted to augment our capital, and without a further and very large capital, it is impossible for us to make the navigable communication in question.

There belongs to every speculation of this kind, much of the risk of a lottery. Many canal companies get blanks, and a few have obtained splendid prizes. In Great Britain, there are canal stocks which have yielded dividends of from thirty to fifty-eight per cent. per annum, and whose original shares have been sold at a profit of a thousand per cent.

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See the *London Magazine* for 1820, *vol.* 1, *pp.* 119, 237, 365, 485, 725. Some of the canal companies in Virginia have, I understand, been highly fortunate. Our company's chance of profit was, for a long time, very slender and precarious. The experiment was new in this territory, and they had every difficulty to struggle with; high wages, inexperienced workmen, sand-bars formed by every gale of wind, in place of those that had been cleared away. At last, by dint of hard labour, patience, perseverance, and a generous spirit of enterprize, they perform their task, and begin to receive a little reward for it. Their prize is, indeed, a very small one; not yet equal to the first cost of the ticket. Their stock for one or two years past has sold at a loss of about fifteen per cent. And notwithstanding all this, they cannot escape envy, hatred and hostility. Notwithstanding all this, we are told by the counsel, that "if this state of things is sanctioned by law, we must submit, —until legislative omnipotence affords relief." I doubt the propriety, indeed I doubt the *morality* of attributing *omnipotence*—in the most mitigated sense which any idiom of language, any fiction of law, or any figure

of the boldest rhetoric would admit—to a legislative body, whose powers are so strictly limited as those of our legislature are, by the constitution of this state, and by the constitution of the united states; both of which we are all bound, by our solemn oaths, to support. If it were even our dreadful lot to live in one of those enslaved and debased nations, whose impious despots assume to be the vicegerents of the Almighty, I think, that when compelled to address our masters in the language of adoration, we should remind them, at the same time, that their omnipotence, like that of heaven, ought to be exercised conformably to that sacred and immutable justice, " whose seat is the bosom of God, whose voice is the harmony of the world."—The counsel proceeds to say, " such a state of things, no doubt, was intended by those who granted the charter, more perhaps for their own benefit than the public weal. But it often pleases a good God to confound those rulers who use power for their own emolument, and to protect the oppressed by the blindness of their oppressors." This is the first time, I believe, that the governor and the legislative council who granted our charter.

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were ever accused or suspected of such corruption. I am the last person on earth disposed to eulogize the character of governor Claiborne; but I will venture to assert, that whether he acted right or wrong, no man ever acted less from the impulse of mercenary motives. And I think I can say as much for that legislative council, whose secretary I was during the whole period of their existence, and with whose measures and views I had the best opportunities of being thoroughly acquainted.

The gentleman asserts, that if the navigation from the bayou to the Mississippi had been complete at the time of the late invasion, our gun-boats would have been saved, and the British army destroyed. Is it possible! Then these gun-boats must have been captured in the basin, as they were endeavouring to save themselves, having retired from the enemy as far as our incomplete navigation would carry them. Yet I have always understood that they were taken, not in the basin, nor in the canal, nor in the bayou; no, nor in the lake Ponchartrain, but in the lake Borgne. I supposed, from no better information than Latour's history, and the official

accouut of captain Jones, the commander of the gun-boats, that they had been taken in the Malheureux island passage, on their way to the Petites Coquilles, or the Rigolets, where they had positive orders to "wait for the enemy, and sink him or be sunk themselves." *Latour's History*, *p.* 58, and *appendix*, *p.* 34, 133. The counsel might as well have imputed to the navigation company, the capture of the city of Washington, as the loss of those gun-boats. The accusations of the wolf against the lamb, in the fable, have truth and justice in them, compared with this charge against us.

Whatever doubt may be imagined respecting the constitutional validity of our charter, or of any of its provisions, none I presume, can exist, but that we have expended our capital on the improvement of this navigation *in good faith*. We acted under the sanction of several state laws, and several acts of congress; and in the presence, and until now, with the acquiescence of the public and their representatives, whose interest and duty it was to oppose our proceedings at once if they were illegal. Our law—the universal and immutable law of all civilized communities—secures to us the full value of the improvements made

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by us under these circumstances, even if it could be held that our charter was invalid, in the whole or in part. Let it not be objected, that a state is a party which cannot be subject to any judgment of this court. That state appears in court as a voluntary suitor. To obtain justice, it must first do justice. A previous indemnity for the whole of our useful expenses, would therefore be the indispensible condition on which the state could be allowed, for itself, or for the citizens at large, to resume the rights which have been granted to the navigation company.

We are told on this subject, by the counsel, that we may rely with unbounded confidence, on the generosity of the state, for ample remuneration for our services:—On that same generosity, in the exercise of which (he adds, by way of encouragement) "she is prosecuting this suit for the protection of her weak citizens against the extortions of the strong."

We have no doubt whatever of the justice of the state, that is, of the great body of her citizens; but if her legislature should continue in the same disposition as when they passed their resolutions against us, it is not probable

they would pay much regard to any petition of ours. Would they not exclaim as we approached their bar to supplicate for remuneration, "begone, too highly favored monopolists! Avaunt, ye minions of exclusive privileges! The forfeiture of your $200,000 is but a just punishment for your nonfeasance and malfeasance; for your many illegal and oppressive actings and doings."—But however well disposed they might be towards us, we prefer to claim our rights from the justice, rather than to solicit them from the generosity of our country.

We are unwilling, if we can help it, to rely on the favor of any one; but we do rely, with unbounded confidence, on the privilege—that invaluable privilege which belongs *exclusively* to the members of a free state—of demanding our own, not as a boon, but as a birth-right.

On this cause may depend the fate of every corporation in this commonwealth. If such a charter as ours can be forfeited, if the hardly earned privileges it confers can be taken away, if the solemn contract made with us by the public, and religiously fulfilled on our part, can be violated, on the pretences that have been set forth against us, what

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corporate body can consider itself safe? To say nothing of the principles proclaimed in the legislative resolutions, which cut up and destroy radically all corporations whatever, not even excepting that great corporation, the government of the state; is there any corporate body existing which might not be accused, and perhaps with truth, of omissions far greater than that which has been unjustly laid to our charge, and strenuously urged as a cause for depriving us of our charter? Is there any bank, any canal company, any turnpike-road company, any ferry-company;—is there any religious, or political, or charitable, or learned, or commercial corporation which has accomplished, to the utmost extent, every purpose contemplated or intended by the legislature,—which has done all that it could possibly have done to promote all the objects of its institution?

If the Orleans Navigation Company, whose perseverance, disinterestedness, and self-denying public spirit have been proved on this trial, to an extent seldom found in any joint stock, or any other corporation, be not secure, then it will be time for every one who holds an interest in any such chartered body in this

state, to sell it out at any sacrifice: and it would be only fair in that case, to give the citizens of the other states, and foreigners also, full notice of the risk they would run by adventuring their funds on speculations, in which, even if all the unavoidable hazards and difficulties attending them should be overcome, there would, at last, be no security.

With these observations, I commit the cause of my clients to the justice of the court.

(See *Post.*)

ROBERTSON vs. *LUCAS.*

APPEAL from the court of the first district.

If the judge *a quo* tell the defendant, he has no need of introducing his evidence, as the plaintiff's case is not proven, the supreme court will remand the case, if they be of a different opinion.

PORTER, J. delivered the opinion of the court. On the trial of this cause, the judge *a quo* being of opinion that the plaintiff had not made out his case, informed the defendant's counsel, that it was not necessary for him to introduce any evidence, and gave judgment accordingly in his favor. We think, from an examination of the testimony, that justice cannot be done, without having this evidence before us. The cause must therefore be remanded for a new trial.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that this cause be remanded to be tried anew, and that the appellee pay the costs of this appeal.

Ripley for the plaintiff, *M'Caleb* for the defendant.

BRADFORD vs. *WILSON.*

Where fraud is put at issue and the supreme court think that the weight of evidence is against the verdict, they will remand the cause for a new trial.

The court has the power to decide differently from the jury, but it is one which, in cases of that description, is to be exercised with great caution.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. This action was instituted on a promissory note, made by Lashley, of whose estate the defendant is curator. The defence set up was insanity, fraud, and want of consideration.

The cause was submitted to a jury, who found for the defendant.

The plaintiff did not apply for a new trial in the court below, but appealed, and asks to have the judgment reversed, as the verdict is contrary to evidence.

Judging alone from what appears on record, and without the advantages which were possessed by those who tried the cause in the

first instance, we are of opinion the weight of evidence is in favor of the plaintiff. In ordinary actions we might proceed on this opinion, to give final judgment; but cases of the nature of that now before us, where fraud is put at issue (like those where damages are to be assessed) fall so peculiarly within the province of a jury, and that body, from its constitution, and the manner investigation is carried on before it, is so much better qualified than this court, to arrive at a correct conclusion on the merits, that we feel great reluctance to decide contrary to their verdict.

As the cause now stands, we think the safest course we can adopt, and the one best calculated to attain the ends of justice, is to send the parties back to investigate their rights anew. If the jury, who already tried the case, have erred, from the motives ascribed to them by the plaintiff; if they have been guided by their passions, and forgot the solemn duty they had to perform, and the responsibility under which they discharged it, twelve other of our citizens can correct their error. On the contrary, should a second jury find as the first has done, and an appeal is again taken, we shall be better enabled to

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satisfy the law, and do that in the case which justice may demand. 10 *Martin*, 66.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, and that the defendant and appellee pay the costs of this appeal.

Watts for the plaintiff, *Duncan* for the defendant.

NICHOLLS vs. *ROLAND.*

A contract for the sale of a slave must be reduced to writing.

If a slave be delivered on trial, parol evidence may be received to shew under what circumstances.

In contracts which are reciprocally beneficial to both parties, the same care is exacted of the bailee which every prudent man takes of his own goods.

In an action for property thus delivered,

APPEAL from the court of the fourth district.

PORTER J. delivered the opinion of the court. It is alleged in the petition, that the defendant entered into a verbal contract with the plaintiff, to purchase from him a slave, which contract was to be confirmed in writing: that the defendant being in great want of the services of the negro to work on his house, begged the use of him, and promised that he should be returned on the next day, or the contract confirmed.

It is further alleged, that the slave has not been returned, and judgment is prayed for

his value, and for the damages sustained by his loss.

The defendant plead the general issue; the cause was submitted to a jury, who found a verdict against the plaintiff, and he has appealed.

Parol evidence alone, was introduced to support the allegations contained in the petition.

and not returned, the burthen of proof as to the facts which excuse the failure to restore it, lies on the bailee.

As our law has declared that the sale of slaves must be reduced to writing, that a verbal alienation of them is null, and that in case the existence of any covenant tending to dispose of them is disputed, parol evidence shall not be admitted to prove it; *Civil Code*, 310, *art.* 41; *Id.* 344, *art.* 2, all the testimony which goes to establish a contract for the purchase of the property mentioned in the petition, must be rejected.

Parol evidence however was legally introduced, to shew that the plaintiff delivered a slave to the defendant, and the circumstances under which that delivery took place. These circumstances, as we learn from the evidence, were—that the plaintiff and defendant had a conversation respecting the sale of a negro, and that he was delivered to the latter on trial,

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who employed him in a ferry boat, and did not return him. Why he was not returned, the testimony taken on the trial, does not inform us, whether he ran away, or was drowned, or was fraudulently disposed of by the appellee, or lost through his fault or negligence, is left to be ascertained by presumption, for nothing express, nothing positive has been proved in regard to it.

From the evidence, it appears the negro was delivered to defendant, under an agreement which authorises us to infer that it was as much the interest of the owner to place him in his possession, as it was that of the appellee to receive him. In contracts which are thus reciprocally beneficial to both parties, the same care is exacted of the bailee, which every prudent man takes of his own goods, and the party to whom the property is delivered, is answerable only for ordinary neglect. *Domat, liv.* 1, *tit.* 5, *sec.* 2, *art.* 4 & 6. *Pothier, Traité du pret a usage, n.* 97, *Dig. liv.* 13, *tit*, 6, *l.* 5, 18 & 19, *par.* 5, *tit.* 2, *l.* 2. The judge *a quo* charged the jury conformably to this doctrine, when he told them, if they were satisfied the defendant had used the slave as he did his own, and paid the same attention

to his preservation, they ought to find a verdict in his favor.

But the judge did not stop here, he went further, he informed the jury that it was the duty of the plaintiff to prove that the loss of the slave proceeded from the fault of the defendant. In this we think he erred. The owner of the slave was only obliged to prove he delivered him. The circumstances which were to excuse the failure to restore him, should have been established by the party who received the property on the condition of returning it. We are far from intending to say, that if the slave absconded, or was drowned, the bailee should have furnished positive proof of these facts. But it was his duty to give evidence which led to a fair and reasonable inference, that the loss of the property was not owing to any fault of his. It would be imposing a most intolerable hardship on the bailor, to require of him, not only to prove that he placed his slave in the hands of another, but also to furnish testimony why he could not get him back. We had occasion a few days since to recognize the general rule on this subject, in the case of *Delory* vs. *Mornet*, and we there held that the burthen

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of proof lies on the person who has to support his case, by proof of a fact, of which he is supposed the most cognizant. That principle applied here brings us at once to the conclusion, that the *onus probandi* lay on the defendant; because he must be presumed to have more knowlege of the slave's conduct, and what occurred to him while in his possession, than the plaintiff can be supposed to have.

The general rule of evidence is, that the point in issue should be proved by the party who asserts the affirmative. If any doubt could be raised on the application of that rule to this case, it is removed by recurring to the law which governs contracts of this kind.

Pothier in his treatise *des Cheptels*, *n.* 53, says, that if a question arises respecting the death of cattle, delivered on the conditions common to this contract, the burthen of proof lies not on the owner, but on the person who received the property.

So in his work *Du pret a usage*, he teaches the same doctrine; that it is the borrower, not the lender, who must establish by evidence the loss of the thing lent. *Pothier, Traité*

Du pret a usage, *n.* 40, and in his Treatise on Obligations, *n.* 620, he presents the very question before us, and decides it, in conformity with the opinion we have just expressed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for a new trial, with directions to the district judge not to charge the jury, that "the plaintiff not having proved it was by the fault of the defendant the negro had disappeared, they ought to find for the defendant." The costs of appeal to be paid by the appellee.

Duncan for the plaintiff, *Dumoulin* for the defendant.

BETHMONT vs. *DAVIS.*

APPEAL from the court of the first district.

A cook hired for 18 months, may be dismissed at any time. If the master was bound to pay his passage back to France, at the end of his services, his representatives may recover the value of such a passage, though the cook died during the pendency of a suit

PORTER, J. The plaintiff, a resident of Paris, in the kingdom of France, contracted with the defendant to serve him eighteen months in the capacity of cook. He was to receive two thousand five hundred francs *per annum*, for his wages, and the defendant further agreed to pay his passage from Havre to

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brought on the master's refusal to pay the passage money.

New-Orleans, and from New-Orleans back to Havre.

In pursuance of this contract the plaintiff came to Louisiana. After he had served the defendant for some months, a dispute arose between them, and he was discharged. This action is brought to recover the whole amount of his wages.

The judge *a quo* gave judgment that the plaintiff recover the sum of $257 25 cents, which amount he states to have decreed on the following grounds:—$107 25 cents for the period of actual service, and $150 to carry the plaintiff back to France.

It is admitted that Bethmont died after the inception of this suit, and before the rendering of judgment in the district court.

A good deal of evidence was taken to shew the conduct of the parties, and the causes which produced the dispute, that ended by the discharge of the plaintiff. But the view I have taken of the case renders it unnecessary to examine that evidence in detail.

Both plaintiff and defendant have appealed.

I think the judgment of the district court is erroneous in that part which allows $150 for

the passage back to France; because, in my opinion, that branch of the contract was personal to the plaintiff, and as by the act of God, it is now impossible for him to perform his part of it, the defendant cannot be compelled to a performance on his. It is true that damages were due by the defendant the moment he refused to comply with his agreement, but nothing on the record shews the amount of these damages, or what pecuniary loss the plaintiff suffered by remaining here, instead of returning to his native country. In the absence of proof as to the amount, we cannot give more than a nominal sum. To give $150 to his heirs, is carrying the contract into complete effect, which, in my opinion, cannot now be done.

As there is a difference of opinion among the members of the court on this point, I am anxious to state somewhat in detail the reasons which influence mine. I cannot agree with the plaintiff's counsel, that the promise to pay the passage back to France, bound the defendant for the sum necessary to effectuate that object, whether he returned or not. On the contrary, I think it was only due in case he should return. If I am right in this posi-

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tion, we have then presented the ordinary case, where the payment of money depends on something to be performed by the other party to the contract. What is the principle of law which governs cases of this kind? This: that until that performance takes place the money is not due. What is the exception? That if the act to be done is personal, and the person who has a right to claim its execution prevents it, he shall not take advantage of his own wrong, and he is responsible in damages, if the party who had to perform this act dies during the pendency of the suit. This is the doctrine of *Pothier, Traité du louage, n. 155.*

The question then returns on my mind what damages are proved? How are we informed that the plaintiff was injured to the amount of $150, because his passage was not paid? How do we learn that if he had gone back he would have been benefited in that sum? Or what damage he sustained by remaining? There is not even any evidence how much it costs for a passage to France, I therefore think the district court erred in decreeing that the defendant should pay for it.

In respect to the other sum allowed by the judge, it does not appear to me any error has

been committed. Our *Code* declares, that a man is at liberty to dismiss a hired servant, attached to his person or family, without assigning any reason for it. This construction cannot be shaken by the argument so strongly enforced by the plaintiff's counsel; that in the present case the parties had contracted for a longer time. Because it is precisely for cases of this kind that we must presume the law to have been made. If the terms of the contract stated no period of service, the master would have the right to dismiss his servant without the authority of this provision in our *Code*.

I think that the judgment of the district court should be reversed, and that the plaintiff recover of the defendant the sum of $107 25 cents; that the plaintiff pay the costs in this court, and the defendant those of the court below.

MARTIN, J. I concur with every part of the opinion of judge Porter, except that which relates to the claim for a sum equal to the costs of the plaintiff's passage back to France.

The defendant has not stated in his answer that he tendered a passage on board of any vessel, to the plaintiff; on the contrary he

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has denied the plaintiff's right to such a passage. It appears therefore clear to me that the plaintiff had a right, immediately on bringing on his suit, to be compensated in damages for the failure of the defendant, to perform that part of the contract, which entitled the plaintiff to demand a passage to France. This right to damages, for this partial breech of the contract, certainly survives to his representatives.

Had the plaintiff, on the defendant's refusal to furnish him with a passage, embarked for France, he might have sued the defendant for the passage money he might have paid, and this would have been recoverable, even if the vessel which carried the plaintiff had sunk. If, unable to procure such a passage, the defendant had given up his expectations to return, he could have had an action to be compensated for this sacrifice. This action could certainly survive. Likely it is this very action that he has instituted. I think his death *pendente lite* has not put the defendant in a better situation.

The passage was a part of the price of the plaintiff's services.

I think the judgment ought to be affirmed.

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MATHEWS, J. This action is founded on a contract, by which the plaintiff agreed to serve the defendant as a cook, for a certain time, stipulated between the parties in a written instrument. Before the expiration of the period of service, the cook was discharged by his employer; and proceedings took place, as have been stated by the junior judge of the court; with whom I agree in opinion in all things, except his construction of that clause in the contract which relates to the payment of the price of the passage of the plaintiff back to Havre. I think the obligations arising out of this contract were entirely reciprocal on the parties up to the period at which the services of Bethmont ceased, by the will of the defendant; and that from that moment, the only remaining obligation (necessary to a complete fulfilment of said contract) rested altogether on Davis. He had bound himself unconditionally to pay the passage of the plaintiff back to Havre, in France, at the expiration of the time of service as stipulated, which, in my opinion, created a positive obligation on his part, to pay so much money as would amount to the price of such passage; for it could not in any

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manner concern the interest of the employer what disposition the servant might make of himself, after his services had ceased. Considered in this way, the contract must be extended to the representatives of the plaintiff, who are entitled to the full benefit of that stipulation which relates to the passage back to Havre, notwithstanding his death. I therefore concur with judge Martin, that the judgment of the district court should be affirmed with costs.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *Davezac* for the defendant.

BARRY vs. *LOUISIANA INSURANCE COMPANY.*

If testimony be admitted, without being sworn to, and be contradictory, the supreme court will remand the case for a new trial.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. Reduced to a single question, as this case is, and that one of fact alone, the only difficulty in its decision arises from the contrariety and direct opposition of the testimony, which relates to the ownership of the ves-

sel on board of which the goods were shipped and insured. When a person who acts as master of a ship, is guilty of barratrous conduct, that is *prima facie* evidence of barratry, so as to entitle the assured to recover against the underwriters, without requiring negative proof that such captain was not the owner, or shewing who really was. The fact of his being owner must be established by the underwriters, in discharge of whom it is intended to operate. *Park on Insurance*, 127.

Opposed to this presumption of law, in the present case, we have it on record, as proven by one witness, that Brown, the master, purchased the vessel at a sale by the marshal. To rebut this testimony the plaintiff offers a copy of the ship's register, by which it appears, that on the oath of the master, Brown, the vessel was registered as the property of John Nicholson, the person who proves Brown to be the owner. Had Nicholson and Brown both been sworn in open court regularly, to testify in the cause, as to the real owner of the schooner, and had their testimony been thus contradictory, and nothing appeared to lessen the credibility of either, we should have concluded that the presumption in fa-

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vor of the captain not being owner ought to prevail, and that the assurers are liable on the policy. But Nicholson has never been sworn, and the registry of the vessel (if at all evidence of the ownership, is not the best) has perhaps been irregularly obtained; and consequently the oath, which is the foundation of it, is before us in such a questionable shape that little weight can be given to it for the purpose of proving property. These circumstances create such embarrassment in weighing the testimony, that we are of opinion that the case ought to be remanded for a new trial, believing from all which appears on the record, that justice requires this mode of proceeding.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that this cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Livermore for the plaintiff, *Duncan* for the defendant.

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If testimony be admitted, without being sworn to, and be contradictory, the supreme court will remand the case for a new trial.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case is similar in all its circumstances to that of *Barry* vs. *Louisiana Insurance Company* just decided, it must therefore receive a similar judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Grymes for the plaintiff, *Duncan* for the defendant.

DAME vs. *GASS.*

If it does not appear on the record that the matter in dispute exceeds $300, the appeal will be dismissed.

APPEAL from the court of probates of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. In this case two persons claim to be appointed curator of a vacant estate. The unsuccessful applicant has appealed from the judgment of the court, which refused to ap-

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point him, and granted letters of curatorship to his opponent.

The parties have argued the case on the merits. But on looking into the record we do not think we are authorised to go into them, for nothing is shewn which gives this court jurisdiction of the cause.

The petition of Dame states, that Smith has died *ab intestato*, that he has left some property behind him, and that he is a creditor for the sum of $175 32 cents.

The opposition of Gass says nothing of the estate left by the deceased, no inventory appears among the proceedings, nor does the evidence establish that the amount exceeds $300. We know nothing therefore of the sum in dispute, and as we are prohibited from examining any other causes but those which the constitution has assigned to us, we cannot look into this. 4 *Martin*, 33.

We are therefore of opinion that the appeal be dismissed with costs.

Preston for the plaintiff, *Orr* for the defendant.

SANCHEZ & WIFE vs. *GONZALES.*

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The supreme court may relieve on the refusal of a new trial; but a very clear case must be made to induce it to do so.

An individual put in possession by the Spanish government, by metes and bounds of a part of the king's land, as her own, acquired such title, which, strengthened by long possession, must prevail.

The certificate of the land commissioner does not avail against claims of individuals.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. In this suit the plaintiffs claim title to a tract of land described in the petition, by right of succession in the wife, as sole heiress to Alonzo Romano, one of the colonists of that place, on the bayou La Fourche, formerly called Valenzuela. The defendant pleads title in himself, and prescription against any which might be adduced by the plaintiffs. The cause was submitted to a jury, on facts presented by both parties, and a special verdict returned. After the finding of the jury, the defendant moved in the district court for a new trial, which motion being over-ruled, and final judgment rendered on the verdict, he appealed.

The first question to be decided by this court is, whether the justice of the case requires that it should be remanded for a new trial?

The power given by law to the court of appeals, to order new trials in the courts of original jurisdiction, ought not to be consider-

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ed as conferring a discretion without rules or limits; altho' the expressions by which it is allowed, appear to be extremely broad and comprehensive. In the present case, an application having been made to the court below for a new trial, we are referred to the grounds therein stated, to shew the error of the court in refusing it; and our attention is directed to the whole evidence in the case. It was decided by this court in the case of *Heerman* vs. *Livingston*, that when facts are submitted to juries for their finding, a refusal by the court to cause the testimony to be reduced to writing, is no ground of error, as in such cases the law does not require it. A special verdict, or facts found by a jury, being conclusive evidence to the court, it is most certainly the duty of the judge, before whom they are submitted and found, to see that nothing but proper evidence be admitted, and that the jury have not violated truth, as established by such evidence; but as the law has provided no means by which the whole of the evidence can be brought before the appellate court, the granting or refusing new trials must be left very much to the discretion of the inferior tribunals. We are unable to per-

ceive that it has been improperly exercised in this case by the judge *a quo*, and are of opinion that the cause ought not to be remanded.

In coming to a conclusion on the merits, it is not thought necessary to examine the facts found by the jury in detail. Advocates often, through zeal for the interest of their clients, submit facts which are not very material in applying the law to a case.

This being a petitory action, it is first necessary to enquire whether or not the plaintiffs have made out any legal title to the property in dispute, and if they have, it then becomes necessary to examine the title as set up by the defendant.

The plaintiffs and appellees have exhibited no written evidence of title from the Spanish government, to the person under whom the wife claims as heir. The facts found by the jury, as submitted on the part of the plaintiffs, shew, that a colony, as it is termed in the pleadings, was settled on the bayou La Fourche, by authority of the government of the country; that Alonzo Romano, the ancestor, was one of the colonists; that Laveau Trudeau, the king's surveyor, measured out to

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each his parcel of land; that said surveyor put Alonzo Romano in possession of the land claimed in this suit; that the archives of Laveau Trudeau have been destroyed by fire; that Romano possessed the said land until his death, and during the space of sixteen years; the minority and heirship of his daughter, the plaintiff, are fully established. The first fact submitted by the defendant, relates also to the plaintiff's title, and finds it to be a concession by the Spanish government, and possession given by Laveau Trudeau.

From these facts, some reliance seems to be placed by the counsel of the appellees, on a title by prescription, in Romano, the ancestor. It is believed that we may safely assume, as a general rule of prescription, that the public domain is not subjected to it by any length of time. But from the expressions in several of the laws in the recopilacion of the Indies, it does appear, that the Spanish government has, in some degree, enacted an exception to the general rule. The 1st law of the 12th title of the 4th book, provides, that persons who have made their habitation upon, and cultivated lands for four years, shall have the right of disposing of them as their own

property. This law also fixes the quantity which may be assigned to each individual of any new settlement, according to his rank, &c. The 14th law of the same book and title, after the declaration of the right of the crown of Spain to the entire sovereignty and dominion of the Indies, indicates the sovereign will as to the disposition of the public lands, and requires that all possessors of land should exhibit titles, &c, and that those who shew good titles, or a just prescription, shall be protected therein, &c. The 18th law *id.* admits persons who have possessed for ten years, to compromise with the government for lands thus possessed.

The sovereign power of a state or kingdom, which holds public domain for the benefit of the whole community, is not restricted by forms as to the manner in which it may assign or lay out any part thereof to an individual in full dominion of property. It is true that this is generally done by written titles, emanating from competent authority, but we are of opinion that it will not be in violation of any principle of national law and equity, or of sound policy, to say that when a part of the public land is separated from the rest by metes and

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bounds, and an individual is put in possession of it, as his own, he acquires title thereto: which is certainly much strengthened by a lapse of time, so long as that, during which it appears from the evidence, the father of the plaintiff possessed the tract of land in dispute. There can be no doubt of the title of the ancestor, having, in the present case, descended to his heir, and being of opinion that the former had a title, we conclude that the appellees have shewn a title in themselves.

It only remains to see if the defendant has produced evidence of a better title. In truth, the finding of the jury shews none of any description, except that which is attempted to be made out by prescription; but it is clear from all the circumstances of the case, taking into view the minority of the plaintiff, that the time necessary to prescribe without a colourable title has not elapsed. It is, moreover, the opinion of the court, that the apellant would not be bettered in relation to his title, by the certificate of confirmation of the land commissioners of the united states, were it admitted to make a part of the facts in the cause: 1st, because the certificate gives no right

against individual claims: and 2d, because it is believed Alonzo Romano acquired a title to the disputed premises in his life time, which descended to his heir, the present plaintiff.

The circumstance of fraud in the possession of the defendant, as found in the 6th fact submitted on his part, must defeat every pretention of title derived from that source, and destroy all just claims which he might otherwise have had for remuneration on account of improvements made by his industry on the land.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Workman & Porter for the plaintiffs, *Derbigny* for the defendant.

ARNOLD vs. *BUREAU.*

APPEAL from the court of the first district.

The signature of one of the partners, binds the firm, when he has no private interest.

MARTIN, J. delivered the opinion of the court. This case was before us in Dec. 1819, and was remanded for a new trial. 7 *Martin*, 292. There was a verdict and judgment as before, and the defendant appealed.

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Price deposed, that after the defendant's failure, Packwood and Price purchased from Philibert, a claim against the defendant.

Philibert informed him that he had no other claim against the defendant, than that which he sold to Packwood & Price.

Price stated he received payment of Philibert's claim in a note of the defendant, endorsed by Deshon & Allen, for one-fourth of its amount, and discharged the defendant.

W. Montgomery deposed, that the plaintiff purchased a quantity of sugar from W. & J. Montgomery, in 1811, and endorsed and put in their hands the two notes of the defendant, on which the present suit is brought, to be collected, and the proceeds applied to the payment of the sugar. The notes were not paid at maturity, and the witness considering his firm as the plaintiff's agents, for the collection of the notes, did not cause them to be protested, and received the note, annexed to the answer, for one-fourth of the plaintiff's claim, and signed the defendant's concordat, with the rest of his creditors. He cannot recollect whether his firm held the two notes, in their own right or as the plaintiff's agents. He believes he gave the plaintiff a receipt

for them, and sold him the sugar for cash, and plaintiff being unable to pay, gave the witness these notes. He kept them a considerable time after May 1811, and the balance due was paid him by J. Touro, the plaintiff's agent. The witness wrote to the plaintiff, at Boston, his domicil, informing him of what his firm had done in the premises, which was not disapproved by the plaintiff. The defendant's note, annexed to the answer, for one-fourth of the two notes sued on, was taken in lieu of them and was paid at maturity.

The rest of the testimony, and the nature of pleadings in the first opinion of this court, are not repeated here.

The case was remanded to give the plaintiff the opportunity of proving that he paid the Montgomery's, and that there were creditors of the defendant residing in New-Orleans, who did not subscribe the concordat, or agreement between the defendant and his creditors.

He has shewn us that he paid the Montgomery's, but there is no evidence of there being creditors, who did not sign the agreement. W. Montgomery, one of the firm, who were the holders of the notes (on which the

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plaintiff's claim rests) signed, and the firm received the note for one-fourth, endorsed as proposed, in satisfaction of the amount of the two notes. If the firm were the owners of the note, the signature of one of them, who is not shewn to be a creditor in his private name, and the subsequent receipt of the note for the fourth, must conclude them.

If they were not the owners, the plaintiff then was; but as he resided in Boston, the absence of his signature is not evidence that there were creditors *residing in New-Orleans*, who did not sign; so that *quâcumque viâ datâ* the defendant is entitled to the benefit of his concordat.

It is therefore ordered, adjudged and decreed, that judgment be annulled, avoided and reversed, and that there be judgment for the defendant in both courts.

Morse for the plaintiff, *Hennen* for the defendant.